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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 94

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL., - - - - - - - - *Petitioners,*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - *Respondent.*

BRIEF OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

I. OPINIONS BELOW.

The citations to the Opinions below of the United States District Court for the Western District of Kentucky and the United States Court of Appeals for the Sixth Circuit are correctly stated by the Petitioners. The order of the District Court referred to by Petitioners (Br. 1) is incorrectly referenced by them. The correct reference is R. 98a.

II. JURISDICTION OF THE COURT.

Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Sixth Circuit entered December 18, 1961, rehearing denied January 17, 1962, by means of a writ of certiorari is contained in 28 U. S. C. Sec. 1254(1).

III. STATUTES INVOLVED.

The pertinent provisions of the Railway Labor Act appear in the Appendix, *infra*, pp. 91-94.

IV. COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

1. Is the enforcement suit remedy provided by Section 3 First (p) of the Railway Labor Act (45 U. S. C. Sec. 153 First (p)) the exclusive means for enforcing awards of the National Railroad Adjustment Board?

2. Is injunctive relief proper to prohibit a strike brought for the purpose of enforcing a money award of the National Railroad Adjustment Board?

V. COUNTER-STATEMENT OF THE CASE.

The Respondent, Louisville and Nashville Railroad Company (herein called L&N), does not accept the statement of the case which appears at pages 3-9 of the Petitioners' brief. The L&N sets forth its own counter-statement of facts.

A. Summary of the Proceedings Below.

This action was instituted by the L&N on February 12, 1959, against the Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Locomotive Engineers, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen (herein referred to as BLF&E, BLE, ORC&B and BRT, respectively), the four General Chairmen on the L&N of those labor organizations and the employees represented by them (R.

5a-7a). L&N sought a permanent injunction against a strike threatened by the four labor organizations to enforce a money award of the First Division, National Railroad Adjustment Board (hereinafter sometimes called Adjustment Board or Board), in a case involving Fireman B. G. Humphries (R. 15a-16a, 30a-34a).

The case was tried before the Court without a jury. The Court heard the oral testimony of some of the witnesses in open court (R. 30b-125b) and, by agreement of the parties made in open court (R. 135b-140b), additional evidence was presented by affidavits and exhibits. The witnesses who testified in open court were primarily witnesses presented by the L&N; thereafter, affidavits were filed by the defendants (R. 36a-87a) and by the L&N (R. 141b-288b).

On January 18, 1961, the District Court, having considered the oral testimony, affidavits, exhibits, and the briefs and arguments of counsel, handed down detailed findings of facts and conclusions of law (R. 134a-153a) and entered judgment for the L&N enjoining the defendants from striking for the purpose of enforcing Award No. 18720 of the Adjustment Board, the case involving Fireman B. G. Humphries (R. 153a-157a).

The Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court and expressly concurred in the findings of facts and conclusions of law of the District Court (R. 309-311).

On June 4, 1962, this Court entered an Order granting certiorari (R. 317).

B. The Facts as Found by the District Court and as Substantiated by the Record.

This proceeding had its genesis in a dispute between the L&N and the BLF&E over the discharge of Fireman Humphries, a member of the BLF&E (R. 135a, 36a-37a, 31b-32b, 91b-114b, 141b-142b).[1] Fireman Humphries was discharged from the service of the L&N on March 31, 1956, after a hearing on charges of assaulting, on February 15, 1956, two other employees of the L&N who were on duty and on the property of the carrier (R. 135a, 37a, 142b).

On April 11, 1956, General Chairman Jake Paschall of the BLF&E, on behalf of Fireman Humphries, protested the dismissal in a letter to W. S. Scholl, Director of Personnel of the L&N, and demanded that Humphries be restored to service with his former seniority unimpaired and paid for time lost (R. 136a, 37a, 142b-143b). This grievance was discussed between representatives of the BLF&E and the L&N during several conferences, the last of the conferences at this stage being held on or about June 7, 1957. Because of the seriousness of the offense and his prior unsatisfactory service (R. 114b), L&N refused to reinstate Fireman Humphries (R. 136a, 143b). During these conferences the General Chairman made no mention of whether Humphries had outside earnings, and no discussion was had as to whether Humphries had earnings in out-

[1] The initial citation of the record in each instance refers to the District Court's Findings of Facts. The citations which follow it are references to some of the evidence of record substantiating the Court's Findings.

side employment or whether, if so, such earnings were to be considered in arriving at the amount of back pay that would be due the claimant should he be reinstated to service (R. 136a, 66a, 32b-34b). Because the L&N would not accede to the demands to reinstate Humphries, the BLF&E threatened to call a strike (R. 136a, 37a, 143b, 209b).

On June 13, 1957, L&N submitted the claim of Fireman Humphries to the Adjustment Board for its decision. The claim was submitted by the L&N to the Adjustment Board in the exact language in which the claim had been submitted to the L&N by the General Chairman of the BLF&E. The claim, in both instances (R. 136a, 17a, 30b, 91b, 142b-143b), was stated as follows:

> "Request that Fireman B. G. Humphries, Louisville Main Stem First Division, be reinstated to service with former seniority unimpaired and paid for all time lost. Article 31."

The regular members of the Adjustment Board could not agree as to whether this claim of Fireman Humphries should be denied or sustained, and a referee was assigned to break the deadlock. On May 14, 1958, the Adjustment Board, with the referee sitting as a member, issued its Award 18720 (R. 136a-137a, 17a-19a, 38a, 30b, 145b) which, based upon a technicality[1] in the investigation, held:

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[1]Humphries' claim for reinstatement was sustained by the Board, not upon the merits, but upon a procedural question.

> "Claim sustained with pay for time lost as the rule is construed on the property."

On the same day, an order was entered by the Adjustment Board directing that its Award 18720 be complied with on or before June 14, 1958 (R. 137a, 38a).

The evidence shows without contradiction that the rule referred to in Award 18720 is a part of Article 31 of the agreement between the L&N and the employees represented by the BLF&E, the specific section of the rule being Article 31(f) (R. 137a, 39a, 146b-147b) which provides as follows:

> "If the discipline administered is not sustained, it will be cancelled and the fireman in question will be paid for any time lost by him resulting from the investigation or action taken."

On May 17, 1958, the Director of Personnel of the L&N ordered that Fireman Humphries be restored to the service, and he returned to the service of L&N (R. 137a, 38a, 53a, 74b, 145b). On the same date the L&N following a procedure it had followed in the past in such instances to obtain information for the purpose of deducting outside earnings (R. 137a, 69b-72b, 125b, 144b, 146b, 153b-160b, 210b, 223b, 261b-262b, 264b-265b), requested that Fireman Humphries furnish the carrier with a statement of his earnings in other employment, if any, while out of L&N service (R. 137a, 34b, 73b-75b, 145b, 210b). The General Chairman of the BLF&E was advised of this request by the L&N on the same date (R. 137a, 53a, 145b). The District Court found that, prior to the Humphries case, the

L&N, in previous discipline cases, had sought advice as to whether or not there were outside earnings, and that the present General Chairman of the BLF&E had notice that such advice had been sought (R. 147a, 71b-73b, 281b-282b, 287b).

Fireman Humphries failed and refused to furnish the L&N with any statement concerning his earnings in other employment while out of L&N service. The General Chairman of the BLF&E, on May 20, 1958, wrote the L&N's Director of Personnel that, in his opinion, Award 18720 and Article 31(f) of the agreement did not authorize any deduction for earnings in outside employment and demanded that the L&N pay to Fireman Humphries the full amount he would have earned with the L&N without any deduction for earnings in outside employment (R. 138a, 39a, 54a-55a, 146b, 152b).

On June 26, 1958, the Director of Personnel of L&N advised the General Chairman of the BLF&E, in part, as follows (R. 138a, 56a-57a, 60a, 77b, 147b-152b):

> "We have secured from our Accounting Department necessary data for determining what Mr. Humphries would have earned as fireman between March 31, 1956 and May 29, 1958, had he not been discharged, and are ready to discuss with you the money payment due him under Award 18720. But we certainly cannot agree with you that his outside earnings during the time he was out of L&N service should not be deducted.
>
> . . . . .
>
> "Fireman Humphries has declined to furnish statement of his outside earnings. If and when

this is done, we are ready to make whatever money payment may be due him under Award 18720."

Article 31(f), according to L&N's interpretation thereof, requires the L&N to make the employee "whole"; that is, that the employee should be paid his actual loss and that earnings in other employment should be considered in determining the actual loss sustained by the employee. It is true, as alleged by Petitioners (Br. 5), that the L&N has had no occasion to deduct outside earnings in the settlement of any of the few prior cases that had arisen under this rule, but the L&N had in the past obtained information concerning an employee's outside earnings prior to settlement and has never paid gross earnings in a case where it had knowledge that the employee being restored to service with pay for time lost had outside employment. L&N's consistent application of the rule has been to make the employee "whole" (R. 146b-152b, 208b-213b, 222b-229b, 261b-267b, 272b-275b, 277b-286b).

During July, 1958, conferences between representatives of the L&N and of the unions were held concerning the dispute as to the meaning and proper application of Award 18720 (R. 138a, 40a-42a, 152b-157b). The General Chairman of the BLF&E invited the General Chairmen of the BLE, ORC&B and the BRT to attend these conferences (R. 138a, 40a).

Fireman Humphries is a member of the craft or class known on the railroad as "firemen" and he is a member of the BLF&E (R. 139a, 36a-37a). His claim for reinstatement and back pay was submitted to the L&N by the BLF&E (R. 139a, 37a). The BLF&E

alone represented Fireman Humphries before the Adjustment Board, and the dispute involved only the provisions of the agreement between the L&N and the employees represented by the BLF&E (R. 139a, 17a-19a, 37a-38a). The BLF&E was the only labor organization that was a party to the dispute before the Adjustment Board in the case involving Award 18720 (R. 139a, 17a-19a, 30b, 145b).

Representatives of the BLE, ORC&B and the BRT were invited to attend the July, 1958 conferences by the General Chairman of the BLF&E (R. 139a, 40a), pursuant to "an agreement of the four Brotherhoods to cooperate in all complaints in respect to the application of awards by the First Division of the National Railroad Adjustment Board" (R. 139a, 23a, 215b).

During these conferences the representatives of the four labor organizations urged that representatives of the L&N, in applying Award No. 18720, should ignore any outside earnings Fireman Humphries may have had (R. 139a, 41a, 152b, 211b). The L&N representatives contended that, since the BLF&E and the L&N could not agree concerning the proper application of Award 18720, the matter should be referred to the Board for an interpretation pursuant to Section 3 First(m) of the Railway Labor Act (R. 139a, 212b). Such a procedure had been followed by a carrier in an identical dispute, *i.e.*, in a dispute between BRT and the Terminal Railroad Association of St. Louis in Award 11825, First Division of the Board (R. 139a, 212b). The BLF&E was unwilling to seek or join the L&N in seeking an interpretation of Award 18720

from the Board, and contended there was no *bona fide* dispute as to the meaning of the award (R. 139a, 212b). At the conclusion of the conference on July 30, 1958, the L&N was requested to furnish a written statement concerning its position in applying Award 18720 (R. 139a, 152b-153b).

This request was complied with by the L&N by a letter dated August 9, 1958, from the carrier's Director of Personnel to the General Chairman of the BLF&E. This letter (R. 140a, 153b-157b) read, in part:

> "We have complied with that part of AWARD 18720 with respect to restoring Fireman Humphries to the service. We stand ready to comply with the balance of the Award, which we interpret to permit deduction of outside earnings, as soon as Fireman Humphries furnishes the requested statement showing this information so that the amount due him under the Award may be determined."

During August, 1958, the representatives of the labor organizations commenced taking preliminary steps necessary in order for them to call a strike for the purpose of compelling the L&N to comply with Award 18720 without any deduction of outside earnings (R. 140a, 42a).

On September 28, 1958, the L&N filed with the Board an *ex parte* "Request for Interpretation" of Award 18720, in which it alleged that a dispute existed between the parties involving the proper application of the award in connection with determining the amount

due the claimant for time lost. This "Request for Interpretation" set forth the nature of the dispute and requested the Board to clarify its Award 18720 with respect to pay for time lost (R. 140a-141a, 115b-125b, 161b-162b).

The Executive Secretary of the Adjustment Board, by letter dated October 9, 1958, requested the General Chairman of the BLF&E to advise whether or not a dispute existed as to the meaning of Award 18720. The General Chairman, by letter dated November 14, 1958, opposed the carrier's "Request for Interpretation" and advised the Executive Secretary of the Board that, prior to the carrier's original submission, no issue had been raised on the property concerning outside earnings and that the petition for interpretation was, in fact, a presentation of a new case and a dispute not before the Board at the time it rendered Award 18720. This letter was concluded with the following paragraph (R. 141a, 66a-67a):

> "This will advise you that there is no dispute on the part of the Brotherhood of Firemen and Enginemen as to the meaning or intent of Award 18720 and the carrier is simply attempting to have the Award changed in the guise of an interpretation."

On December 17, 1958, a divided Board, with the referee sitting to break the deadlock, declined to interpret the Award, holding that the question of outside earnings was a new dispute (R. 141a-142a, 68a, 30b, 162b-163b).

A further conference was held on January 23, 1959, between representatives of the L&N and the four labor organizations. Representatives of the labor organizations again demanded that Fireman Humphries be paid wages without any deduction of outside earnings and advised that a strike date would be set if this were not done (R. 142a, 45a, 163b, 212b). L&N representatives declined so to apply the award and suggested that the controversy be resolved by submitting it to the Board as a new dispute (R. 142a, 163b, 212b). On January 23, 1959, representatives of the L&N submitted the controversy *ex parte* to the Adjustment Board as a new dispute for its decision (R. 142a, 45a-46a, 3b-17b, 30b, 163b).

The General Chairmen of the four labor organizations, on February 10, 1959, by a telegram, advised the Director of Personnel of the L&N that employees of those organizations would strike on February 13, 1959, ". . . due to carrier's adamant insistence that outside earnings of Fireman Humphries must be deducted from any money due him under Award 18720" (R. 142a-143a, 21b, 63b-64b, 164b).

On the same date the Director of Personnel was also advised by the unions through the Secretary of the National Mediation Board that the strike was called because of the ". . . refusal of carrier to apply Award 18720 First Division NRAB" (R. 143a, 19b, 61b, 165b).

On December 9, 1959, an equally divided Board with a Referee sitting to break the deadlock, dismissed L&N's submission of the controversy as a new dispute,

holding that Award 18720 disposed of the claim of Fireman Humphries for reinstatement and back pay and that "the matter must be judged res judicata" (R. 145a, 69a-72a, 167b).

In accordance with the stipulation of the parties, the District Court found that the carrier would suffer irreparable injury in the event of the strike and that the amount involved exceeded $10,000, exclusive of interest and costs (R. 149a, 28b).

The Court further found that no court proceeding to enforce Award 18720 had been filed pursuant to the provisions of Section 3 First(p) of the Railway Labor Act (45 U.S.C. Sec. 153 First (p)) (R. 149a, 270b-271b), and that the sole purpose of the threatened strike was to enforce Award 18720, a money award of the First Division, National Railroad Adjustment Board (R. 149a, 24a, 26a, 42a, 19b, 21b, 61b, 64b, 164b-165b, 213b-217b).

The District Court also expressly found that L&N had exercised good faith and was not guilty of bad faith in insisting upon its right to deduct outside earnings,[1] or of coming into Court with "unclean hands" (R. 146a-147a).

Further recital of additional findings and pertinent facts is reserved for statement in subsequent sections of this brief.

---

[1]In both Courts below, Petitioners argued that the L&N was guilty of bad faith and contended that the L&N was attempting to unilaterally change the existing agreement concerning deduction of outside earnings. Both of the Courts below expressly rejected Petitioners' contentions. Petitioners make no argument in this Court that the L&N was guilty of bad faith.

Findings of fact shall not be set aside unless clearly erroneous. Rule 52, Federal Rules of Civil Procedure. The findings of fact by the District Court, entered after reviewing the evidence and having heard and observed some of the witnesses testify in open court, are abundantly supported by the evidence and should not be disturbed.

VI. SUMMARY OF ARGUMENT.

The District Court and the Court of Appeals correctly found that the strike was for the purpose of forcing the carrier to pay a money award of the National Railroad Adjustment Board, *Louisville & N. R. Co.* v. *Brotherhood of Locomotive Engineers,* 190 F. Supp. 829, 836 (W.D. Ky.), aff'd. 297 F. 2d 608 (C.A. 6), reh. den. January 17, 1962, and properly held that such a strike was in violation of the Railway Labor Act. *Brotherhood of R. Trainmen,* v. *Denver & Rio Grande W. R. Co.,* 290 F. 2d 266 (C.A. 10), cert. den. 366 U. S. 966, reh. den. 368 U. S. 873.

Two very different types of disputes are encompassed within the provisions of the Railway Labor Act, and different remedies are provided for each in the Act. "Major" disputes relate to disputes over the formation of collective bargaining agreements or efforts to secure them. They involve the acquisition of rights for the *future,* not the assertion of rights claimed to have vested in the *past.* "Minor" disputes, on the other hand, contemplate the existence of a collective bargaining agreement, and such disputes in-

volve the meaning or proper application of a particular provision of the agreement to a specific situation. A "minor" dispute involves a claim to rights accrued, not the creation of new rights for the future. *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711; *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30. The dispute between the L&N and the BLF&E involving the claim of Fireman Humphries is clearly a minor dispute.

Congress was aware that the problems involved in resolving the two kinds of disputes are different and require different treatment. In major disputes, the parties are required to submit to the successive procedures of Section 5 First(b) (45 U.S.C. Sec. 155 First(b)) but the compulsions go only to insure that those procedures are exhausted before striking. Congress *expressly* provided that arbitration of major disputes is *voluntary*. Section 7 (45 U.S.C. Sec. 157). Thus, no authority exists to decide a major dispute unless the parties themselves agree to arbitration. *Elgin, J. & E. Ry. Co.* v. *Burley, supra.*

Minor disputes, however, can be settled peacefully by methods analogous to long-established judicial procedures for construing and enforcing contracts and, by the 1934 amendments, Congress provided a complete statutory plan for the orderly and peaceful settlement of all such minor disputes. Section 3 First (45 U.S.C. Sec. 153 First).

If the parties are unable to settle a minor dispute, it may be referred by either party to the National Railroad Adjustment Board created by Section 3 First (i)

(45 U.S.C. Sec. 153 First (i)). It is then "considered as compulsory arbitration in this limited field." *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30, 39. In Section 3 First (m) (45 U.S.C. Sec. 153 First (m)), it is provided that an award of the Adjustment Board, *except in so far as it shall contain a money award*, shall be final and binding. Award 18720 of the First Division of that Board is a "money award" which falls within the clearly expressed exception of Section 3 First (m) (45 U.S.C. Sec. 153 First (m)), and does not constitute a "final and binding award." *Congress manifestly envisioned further steps in the statutory plan beyond the Board's award at least insofar as they require the payment of money.*

The Act does expressly provide for additional proceedings for the orderly and peaceful settlement of minor disputes beyond the rendering of the Board's award. In case of a dispute involving an interpretation of the award, either party may request the Board to interpret the award in the light of the dispute. Section 3 First (m) (45 U.S.C. Sec. 153 First (m)). In case of an award favorable to a claimant, the proper Division of the Board shall make an order, directed to the carrier, to make the award effective and, if the payment of money is required, to pay such sum to the employee. Section 3 First (o) (45 U. S. C. Sec. 153 First (o)). If the carrier does not comply with an order, enforcement may be sought in a suit by the union or the employee in a District Court of the United States as provided in Section 3 First (p) (45 U.S.C.

Sec. 153 First (p)). *Union Pacific R. Co.* v. *Price*, 360 U. S. 601.

The enforcement suit provided by Section 3 First (p) of the Act is an integral part of the entire statutory plan for the complete and final settlement of such a minor dispute as is the one involved here. The specification of one remedy in the Railway Labor Act normally excludes another. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297; *Union Pacific R. Co.* v. *Price*, 360 U. S. 601. The existence of the complete statutory scheme for the orderly and peaceful settlement of such minor disputes cannot realistically be squared with the contention that Congress did not intend to foreclose strikes called for the purpose of enforcing a money award of the Adjustment Board. *Brotherhood of R. Trainmen* v. *Denver & Rio Grande W. R. Co.*, 290 F. 2d 266 (C.A. 10), cert. den. 366 U. S. 966, reh. den. 368 U. S. 873. The legislative history and contemporary understanding of the 1934 amendments to the Railway Labor Act support the decisions of the courts below.[1]

The L&N has exhausted its remedies under the Act and is required to take no further steps. In fact, this Court has interpreted Section 3 First (p) as impliedly prohibiting a carrier which had been unsuccessful before the Board from maintaining a suit for a determination of its rights because Congress intended that Section 3 First (p) was to be the exclusive review in a "stairway leading to decision." *Washington Terminal*

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[1]This is dealt with at pp. 40-53, *infra*.

Co. v. *Boswell,* 124 F. 2d 235, aff'd. by an equally divided Court, 319 U. S. 732.

The crux of the Petitioners' contentions is that they have a common law right to strike to enforce contract claims and, since the Railway Labor Act does not expressly prohibit strikes, no such prohibition may be inferred. This reasoning is unsound in two respects.

First, the right to strike to enforce claims under an existing contract is at least questionable under the common law. *Dorchy* v. *Kansas,* 272 U. S. 306. "... To enforce payment by a strike is clearly coercion. . . . Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike." *Ibid.,* p. 311.

Not a single one of the eighteen cases relied upon by Petitioners support their contention that they have a common law right to strike for the purpose of enforcing a money award of the Adjustment Board. Nine of these cases involve the National Labor Relations Act or the Labor Management Relations Act, which Acts, this Court has held, are entirely different from the Railway Labor Act in the provisions made for the settlement of disputes. *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.,* 353 U. S. 30, 31-32, note 2; *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195, 211, note 30. The Railway Labor Act was not involved in *Wolff Co.* v. *Industrial Court,* 262 U. S. 522. *Wilson* v. *New,* 243 U. S. 332, involved the Constitutional power of Congress to establish an eight-hour day and a schedule of minimum wages for a limited period for employees of carriers engaged in interstate and foreign

commerce; but the Constitutional power of Congress is not questioned in the present suit which involves only a minor dispute. Only seven of Petitioners' cases involve the Railway Labor Act and five of these are clearly inapposite here because four involve major disputes and one involves a jurisdictional dispute. The two remaining cases relied upon by Petitioners, *Washington Terminal Co.* v. *Boswell, supra,* and *Manion* v. *Kansas City Terminal Ry. Co.,* 353 U. S. 927, clearly did not decide the question of the alleged right to strike for the purpose of enforcing a money award of the Adjustment Board.

Secondly, Petitioners' position that, in the absence of *express* prohibitions, common law rights are unaffected by the Railway Labor Act is simply not true. In a number of different situations the Act has been held, *by implication,* to take away common law rights. Please see, *e.g., Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515; *Washington Terminal Co.* v. *Boswell,* 124 F. 2d 235, aff'd. 319 U. S. 732; *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297; *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192; *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen,* 338 U. S. 232.

More significantly, Petitioners must concede that the Railway Labor Act has already been construed in many cases to impliedly prohibit strikes in even major disputes until the remedies provided by the Act have been exhausted. Please see, *e.g., Elgin, J. & E. Ry Co.* v. *Burley,* 325 U. S. 711, 725; *Brotherhood of Railway and Steamship Clerks* v. *Railroad Retirement Board,*

239 F. 2d 37, 41, 42; *American Airlines, Inc.* v. *American Air Line Pilots Assn.*, 169 F. Supp. 777, 783-789 (S.D. N.Y.). This rule does not operate to preclude forever a strike in a major dispute. If the exhaustion of the Act's procedures applicable to major disputes does not lead to a binding settlement, the employees are free to strike unless the parties have agreed to arbitrate, and such arbitration is specifically made voluntary by the Act. Section 7 (45 U.S.C. Sec. 157).

Most significantly here, despite the absence of any express prohibition against strikes over minor disputes, such strikes have also been held illegal under the Railway Labor Act. *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30; *Union Pacific R. Co.* v. *Price*, 360 U. S. 601, 611-612, n. 10. Exhaustion of the detailed statutory procedures relating to minor disputes leads to a final settlement so that strikes to settle minor disputes are neither necessary nor permissible. *Brotherhood of R. Trainmen* v. *Denver & Rio Grande W. R. Co.*, 290 F. 2d 266, (C.A. 10), cert. den. 366 U. S. 966, reh. den. 368 U. S. 873. Since the exhaustion of the statutory procedures, except in the one instance which Congress *specifically* made voluntary, is mandatory before resorting to strikes involving *major* disputes, *a fortiori*, the exhaustion of the statutory procedures relating to *minor* disputes, none of which Congress expressly made voluntary, is mandatory before resorting to a strike.

The Norris-LaGuardia Act (29 U.S.C. Sec. 101, *et seq.*) has not withdrawn the power of federal courts to issue injunctions in labor disputes in all instances.

That Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. The District Court properly held that it had jurisdiction to issue necessary injunctive orders to vindicate the processes of the Railway Labor Act. *Virginian Railway Co.* v. *System Federation No 40*, 300 U. S. 515, 563; *Brotherhood of R. Trainmen* v. *Howard*, 343 U. S. 768, 774; *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30, 40; *Union Pacific R. Co.* v. *Price*, 360 U. S. 601, 611-612, n. 10).

Manion v. *Kansas City Terminal Ry. Co.*, 353 U. S. 927, relied upon by petitioners, does not support them. In the *Manion* case, the first stage of the statutory procedure, that of conferences on the property, had been completed and the carrier had not submitted the dispute to the Adjustment Board. The carrier there had an adequate remedy at law, namely, to submit the dispute to the Board, and, therefore, equitable relief was properly denied. Actually, the *Manion* case emphasizes that the statutory scheme provided by the Railway Labor Act for the settlement of minor disputes must be complied with because the injunction prohibiting a strike was held to be improper until such time as the provision for submitting the dispute to the Adjustment Board had been complied with by the railroad. The *Manion* case itself vindicates the processes of the Railway Labor Act.

Five United States District Courts and four United States Courts of Appeals have all stated that a strike to enforce an award of the Adjustment Board is violative of the Railway Labor Act. *Grand Trunk Western R.R. Co.* v. *Railroad Trainmen*, 32 CCH Labor Cases ¶ 70,695 (N.D. Ill.); *Baltimore & Ohio R. Co.* v. *United Railroad Workers*, 176 F. Supp. 53, 58 (S.D. N.Y.); *Atlantic Coast Line R. Co.* v. *System Federation No. 44* (E.D. Tenn.), unreported, but please see the record here (289b-292b); *Denver & Rio Grande W. R. Co.* v. *Brotherhood of R. Trainmen*, 185 F. Supp. 369, 372 (D. Colo); *Louisville & N. R. Co.* v. *Brotherhood of Locomotive Engineers*, 190 F. Supp. 829 (W.D. Ky.); *Chicago River & I. R. Co.* v. *Brotherhood of R. Trainmen*, 229 F. 2d 926, 931 (C.A. 7); *Brotherhood of R. Trainmen* v. *Denver & Rio Grande W. R. Co.*, 290 F. 2d 266 (C.A. 10); *Louisville & N. R. Co.* v. *Brotherhood of Locomotive Engineers*, 297 F. 2d 608 (C.A. 6); *Pan American World Airways* v. *Flight Engineers*, —— F. 2d ——, 45 CCH Labor Cases ¶ 17,767 (C.A. 2), decided July 25, 1962. Not one Court has held otherwise.

The decisions below are correct and should be affirmed.

VII. ARGUMENT.

A. THE RAILWAY LABOR ACT PROHIBITS STRIKES TO ENFORCE MONEY AWARDS OF THE NATIONAL RAILROAD ADJUSTMENT BOARD.

1. Award 18720 is a Money Award and the Purpose of the Strike is to Enforce the Union's Interpretation of that Award.

There can be no doubt that the sole purpose of the threatened strike was stated by the unions to be one to enforce Award 18720. The strike was called because of the alleged ". . . refusal of carrier to apply Award 18720 First Division NRAB" (R. 61b). In the answer filed by the unions in this case it was alleged that the strike was called ". . . solely because of the plaintiff's refusal to comply with the plain provisions of an award entered by the National Railroad Adjustment Board . . ." (R. 26a).

The unions throughout their brief purport to be enforcing an award by the Board in favor of the employees. They contend (Br. 11) that the dispute is one which ". . . has been decided by the Adjustment Board in favor of employees". They contend *in limine* (Br. 2) that the dispute has been settled by an award in *favor* of the employees and that ". . . the award has not been made effective by the railroad" (Br. 2).

The carrier has never conceded that the award is entirely favorable to the employee. To the contrary, the carrier's position throughout the handling of the dispute has been that it complied with that part of the award with respect to restoring Fireman Humphries

and that it is ". . . ready to comply with the balance of the award, which we interpret to permit deduction of outside earnings, as soon as Fireman Humphries furnishes the requested statement showing this information so that the amount due him under the award may be determined" (R. 157b).[1]

Irrespective of the question concerning the deductibility or nondeductibility of outside earnings, it is manifestly clear that Award 18720 purports to order the carrier to pay money to the employee, and the conclusion is inescapable that Award 18720 is a "money

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[1]A rule of construction in such cases was clearly enunciated by the First Division of the Adjustment Board in Award 16408 rendered on July 24, 1953 (R. 252b-256b) wherein it was stated:

> "Among union-management agreements, some explicitly authorize such deductions and a few prohibit them; but most are silent on the question, being content either not to mention compensation for lost time or merely to state in general that such compensation shall be paid, but without defining explicitly what is meant by 'compensation', 'lost time', or 'lost earnings'. We are of the opinion that, where an agreement is not explicit and where there is no controlling practice to the contrary on a property, a general rule mentioning compensation for lost time or earnings shall be interpreted so as to permit or authorize deduction for earnings in outside employment. This is because we incline to the view, supported in import by law and by a number of awards of this Division, that the primary purpose of providing such compensation is to make the wronged employe whole. We think such an employe is made whole when he receives an amount of compensation from his primary employer plus wage income from one or more 'outside' employers equal to the amount he would have earned if he had worked steadily with the primary employer in the absence of wrongful deprivation of such work. To allow him more would make him more than whole; that is, he would be more than compensated for the time and the earnings he lost through the carrier's action."

The burden was upon the BLF&E to convince the Adjustment Board that a controlling practice on the part of the carrier *not* to consider outside earnings existed in administering the provisions of the agreement, and the BLF&E failed to do this.

award" within the meaning of Section 3 First(m) of the Railway Labor Act (45 U.S.C. Sec. 153 First(m)). *Union Pacific R. Co.* v. *Price,* 360 U. S. 601, 608. Petitioners' attempt (Br. 14) to criticize the L&N for stating the issue as one involving the right to strike "for the purpose of forcing a carrier to pay a money award" is entirely unjustifiable. The Petitioners, at no place in their brief, dispute the fact that Award 18720 is a "money award".

The District Court (R. 149a) and the Court of Appeals (R. 310-311) correctly found that the strike was for the purpose of forcing the carrier to pay a *money* award of the National Railroad Adjustment Board, *Louisville & N. R. Co.* v. *Brotherhood of Locomotive Engineers,* 190 F. Supp. 829 (W.D. Ky.), aff'd. 297 F. 2d 608 (C.A. 6), reh. den. January 17, 1962, and properly held that such a strike was in violation of the Railway Labor Act. *Brotherhood of R. Trainmen* v. *Denver & Rio Grande W. R. Co.,* 290 F. 2d 266 (C.A. 10), cert. den. 366 U. S. 966, reh. den. 368 U. S. 873. Both Courts below also properly referred to the dispute as a "minor" dispute.

2. Major and Minor Disputes Are Treated Differently in the Railway Labor Act.

This Court has often recognized that two very different types of disputes are encompassed within the provisions of the Railway Labor Act. In *Elgin, J. & E. Ry. Co.* v. *Burley,* 325 U. S. 711, this Court interpreted the Railway Labor Act as making a clear distinction between "major" and "minor" disputes and the different remedies provided for each in the Act.

"Major" disputes relate to disputes over the formation of collective bargaining agreements or efforts to secure them. They involve the acquisition of rights for the future, not the assertion of rights claimed to have vested in the past. "Minor" disputes, on the other hand, contemplate the existence of a collective bargaining agreement, and such disputes involve the meaning or proper application of a particular provision of an agreement to a specific situation, generally involving only one employee. A "minor" dispute involves a claim to rights accrued, not the creation of new rights for the future. *Elgin, J. & E. Ry. Co.* v. *Burley,* 325 U. S. 711, 722-723; *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.,* 353 U. S. 30, 33. Petitioners' brief blurs the distinction between these two different types of disputes and the remedies provided for each in the Railway Labor Act.

Congress, in amending the Railway Labor Act in 1934, sought "to provide for the prompt and orderly settlement" of both major and minor disputes in order

". . . to avoid any interruption to commerce or to the operation of any carrier." Section 2(1), (4) and (5). Congress was aware that the problems involved in resolving the two kinds of disputes are different and require different treatment. Minor disputes involving the interpretation of an existing agreement can be settled peacefully by methods analogous to long-established judicial procedures for construing and enforcing contracts. Major disputes, however, cannot readily be handled in this manner. A court or administrative tribunal cannot, for example, readily decide, by looking to the terms of an existing document or to past practice, whether or not an increase in future rates of pay is justified. No court or agency is empowered to decide the dispute by making an agreement for the parties. Therefore, Congress created distinctive procedures for dealing with the two different types of disputes.

Concerning major disputes, this Court, in *Elgin, J. & E. Ry. Co.* v. *Burley, supra,* stated (p. 725):

> "The parties are required to submit to the successive procedures designed to induce agreement. Section 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration."

In major disputes either of the parties may invoke the services of the National Mediation Board, which "shall use its best efforts, by mediation, to bring them

to agreement". Section 5 First (45 U.S.C. Sec. 155 First). If mediation is unsuccessful and a serious strike is threatened, the President can appoint an Emergency Board, which "shall investigate promptly the facts as to the dispute and make a report thereon to the President." Section 10 (45 U.S.C. Sec. 160). The Act has been construed to prevent strikes during this entire period. However, neither the Mediation Board nor the Emergency Board can impose upon the parties a binding settlement of a major dispute. The parties, by mutual agreement, can refer a major dispute to a Board of Arbitration pursuant to Section 7 (45 U.S.C. Sec. 157). This section clearly provides that "the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise". Thus, the procedures relating to major disputes were made either voluntary or not finally determinative.

But the procedures provided for the handling of minor disputes are entirely different, as we next proceed carefully to show.

3. The Railway Labor Act Provides a Complete Statutory Plan for the Orderly and Peaceful Settlement of Minor Disputes and the Statutory Enforcement Proceeding of Section 3 First (p) is an Integral Part of the Statutory Plan and is the Exclusive Remedy for Enforcing Awards of the Adjustment Board.

By the enactment of the 1934 Amendments, Congress effectuated a basic change in the 1926 Act in the handling of minor disputes and provided a complete statutory plan for the orderly and peaceful settlement of such disputes. Speaking of minor disputes, in *Elgin, J. & E. Ry. Co.* v. *Burley, supra*, this Court stated:

> "The course prescribed for the settlement of grievances is very different beyond the initial stage [of negotiation]. Thereafter, the Act does not leave the parties wholly free, at their own will, to agree or not to agree." (p. 725).
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> . . . . . .
>
> "The procedure adopted is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board." (p. 727).

A separate agency, the National Railroad Adjustment Board, is created by Section 3 First (45 U.S.C. Sec. 153 First). If the parties are unable to settle a minor dispute, it may be referred by either party to the Adjustment Board. Section 3 First (i) (45 U.S.C. Sec. 153 First (i)). Each party to the dispute may submit it to the Adjustment Board, whether or not the

other is willing. *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30. In Section 3 First (m) (45 U.S.C. Sec. 153 First (m)), it is provided that an award of the Adjustment Board, except insofar as it shall contain a money award, shall be final and binding. Award 18720 of the First Division of the Adjustment Board is a "money award" which falls within the clearly expressed exception of Section 3 First (m) (45 U.S.C. Sec. 153 First (m)), and does not constitute a "final and binding award". *Union Pacific R. Co.* v. *Price*, 360 U. S. 601, 608.

The Act also expressly provides for additional proceedings for the orderly and peaceful settlement of minor disputes beyond the rendering of the Board's award. In case of a dispute involving an interpretation of the award either party may request the Board to interpret the award in the light of the dispute. Section 3 First (m) (45 U.S.C. Sec. 153 First (m)).[1] In case of an award favorable to a claimant, the proper Division of the Board shall make an order, directed to the carrier, to make the award effective and, if the payment of money is required, to pay such sum to the employee. Section 3 First (o) (45 U.S.C. Sec. 153 First (o)). If the carrier does not comply with an order, enforcement may be sought in a suit by the

[1]It should be noted that where an Adjustment Board award specified that the employee should be reinstated and "compensated for loss of earnings during the time held out of service", the Board subsequently decided a dispute concerning the deductibility or non-deductiblity of outside earnings upon a request by the carrier for an interpretation of the award previously made. Please see First Division Award 11825 (R. 218b-219b) involving a dispute between BRT and the Terminal Railroad Association of St. Louis. and the First Division's "Interpretation of Award 11825" (R. 220b-222b).

union or the employee—here, the BLF&E or Humphries—in a District Court of the United States as provided in Section 3 First (p) (45 U.S.C. Sec. 153 First (p)).

Under the provisions of Section 3 First (p) of the Act, the petitioner, or the person for whose benefit such award was made, may bring an action in the United States District Court for the district in which he resides or in which the carrier is located or through which the carrier operates. The Act sets forth that the suit in the District Court shall proceed in all respects as other civil suits and that the findings and order of the Board shall be *prima facie* evidence of the facts therein stated. It is further provided that the petitioner is not liable for costs and that such costs shall be paid out of the appropriation for expenses of the Courts of the United States. If the petitioner prevails, he is allowed a reasonable attorney's fee to be taxed and collected as part of the costs of the suit. Thus, the Act clearly provides a complete method for the final settlement of minor grievances and such exclusive method is the only way that awards can be enforced.

The district courts are given power to enter orders appropriate "to enforce or set aside" awards of the Board, and courts have refused to enforce erroneous orders of the Board and their power to do so is unquestioned. *Boos* v. *Railway Express Agency*, 253 F. 2d 896 (C.A. 8); *Thomas* v. *New York, Chicago & St. Louis R. Co.*, 185 F. 2d 614 (C.A. 6); *Dahlberg* v. *Pittsburgh & L. E. R. Co.*, 138 F. 2d 121 (C.A. 3);

Brotherhood of Railway Clerks v. *Atlantic Coast Line R. Co.*, 253 F. 2d 753 (C.A. 4). This fact may persuade unions which have obtained highly questionable awards to attempt to enforce them by strikes rather than by an enforcement suit in which the award is subject to judicial scrutiny. In fact, in view of the liberal provisions of Section 3 First (p), a desire to avoid judicial review would seem to be the only reason a union would call a strike to enforce an Adjustment Board award.[1] The expenses of litigation afford no reason for by-passing the court since the Act allows a recovery of an attorney's fee and costs are paid by the Government. Thus, the only apparent reason for a strike to enforce an award—that of preventing judicial review—is not a legitimate one.

All of the provisions of the Railway Labor Act, considered above, manifest a clear Congressional intent that the enforcement suit provided by Section 3 First (p) of the Act (45 U. S. C. Sec. 153 First (p)) is an integral part of the entire statutory plan for the complete and final settlement of such a minor dispute as is involved here.

The existence of the complete statutory scheme for the orderly and peaceful settlement of such minor disputes cannot realistically be squared with the contention that Congress did not purpose to foreclose strikes, such as the one involved here, called for the purpose of enforcing a money award of the National Railroad Adjustment Board. *Brotherhood of R. Trainmen*, v.

[1]Indeed, in the present suit counsel for the Petitioners have candidly conceded that a Court of Law would probably allow the deductions of outside earnings to be made (R. 148a).

Denver & Rio Grande W. R. Co., 290 F. 2d 266 (C.A. 10), cert. den. 366 U. S. 966, reh. den. 368 U. S. 873. The specification of one remedy in the Railway Labor Act normally excludes another. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297; *Union Pacific R. Co.* v. *Price*, 360 U. S. 601.

Not only is the threatened strike repugnant to the expressly stated purposes of the Act (45 U. S. C. Sec. 151a), but—this is of primary significance—it is a flagrant disregard by the unions of the remedy specifically provided to them by Congress to preclude such a strike.

4. The Remedies Provided by the Act Are Not Merely Voluntary Unless So Specified in the Act.

The import of the Petitioners' argument is that Congress, by enacting the 1934 Amendments to the Railway Labor Act, merely provided procedures for the settlement of minor disputes with the hope that the availability of such procedures would go far toward eliminating strikes; that the scheme established by the Act for the peaceful resolution of minor disputes is entirely voluntary and that the unions are free to disregard them and strike instead.

The remedies provided by the Railway Labor Act are not merely voluntary unless *specifically* made so by the Act. We submit that there is one general rule applicable to both major and minor disputes: the parties must exhaust the remedies provided by the Act. *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, 725; *Norfolk*

& Portsmouth Belt Line R. Co. v. *Brotherhood of R. Trainmen*, 248 F. 2d 34, 45 (C.A. 4), cert. den. 355 U. S. 914; *Chicago, R. I. & P. R. Co.* v. *Switchmen's Union*, 187 F. Supp. 581 (W.D. N.Y.); *American Air Lines, Inc.* v. *American Air Line Pilots' Ass'n.*, 169 F. Supp. 777, 783-789 (S.D. N.Y.); *Pennsylvania R. Co. Local 2013 of United R. Wkrs., etc.*, 178 F. Supp. 53, 61 (E.D. Pa.); *Baltimore & Ohio R. Co.* v. *United Railroad Wkrs., etc.*, 176 F. Supp. 53, 58 (S.D. N.Y.). This rule does not always preclude a strike in a major dispute because, as we have seen, exhaustion of the Railway Labor Act's procedures applicable to major disputes does not lead to a binding settlement, unless the parties agree to arbitrate, and arbitration is *specifically* made voluntary by the Act. Sec. 7 (45 U. S. C. Sec. 157); *Brotherhood of R. Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50, 62-63. On the other hand, in minor disputes where a process for a final decision is provided, exhaustion of the detailed statutory procedures relating to minor disputes leads to a final settlement, judicially enforceable, so that a strike to settle minor disputes is neither necessary nor permissible.

The argument that the statutory remedies for the settlement of minor disputes are voluntary is refuted by *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30 wherein such an argument was made to this Court without success. There the unanimous opinion of the Court (p. 34) referred to the Trainmen's contention that the Railway Labor Act meant "only that an Adjustment Board has been organized and that the parties are free to make use of

its procedures if they wish to; but that there is no compulsion on either side to allow the Board to settle a dispute if an alternative remedy, such as resort to economic duress, seems more desirable". Petitioners' argument was rejected by the Court which held that the Trainmen's contention would render Section 3 First "meaningless". In the *Chicago River* case, *supra*, this Court held, despite the absence of any express prohibition, that a strike could be enjoined during the pendency of the dispute before the Adjustment Board.

Manion v. *Kansas City Terminal Ry. Co.*, 353 U. S. 927, relied upon by Petitioners, does not support them. In the *Manion* case, the first stage of the statutory procedure, that of conferences on the property, had been completed and the carrier had not submitted the dispute to the Adjustment Board. The carrier there had an adequate remedy at law, namely, to submit the dispute to the Board, and, therefore, equitable relief was properly denied. Actually, the *Manion* case emphasizes that the statutory scheme provided by the Railway Labor Act for the settlement of minor disputes must be complied with because the injunction prohibiting a strike was held to be improper until such time as the provision for submitting the dispute to the Adjustment Board had been complied with by the railroad. The *Manion* case itself vindicates the processes of the Railway Labor Act and preserves the second stage of the statutory scheme.

In *Louisville & N. R. Co.* v. *Brown*, 252 F. 2d 149, 153 (C.A. 5), cert. den. 356 U. S. 949, a strike was called over a minor dispute and before that dispute

had been handled on the property, which is a prerequisite to taking a dispute to the Adjustment Board. Sec. 3 First (i) (45 U. S. C. Sec. 153 First (i)). The appellees there contended that, under the *Manion* case, a strike over a minor dispute "may not be enjoined unless the jurisdiction of the Adjustment Board has already attached" (p. 153). The Court commented that neither party could have taken the dispute to the Adjustment Board since it had not as yet been handled on the property[1] and held (p. 154):

> ". . . We think that in that posture of affairs the principle of Chicago River would apply and that had an injunction been sought because the strike was illegal, it would lie to prevent the frustration of the statutory grievance-adjustment procedure."

Petitioners' argument that a strike is enjoinable only while the dispute was pending before the Adjustment Board is further refuted by the opinion of this Court in *Union Pacific R. Co.* v. *Price*, 360 U. S. 601,

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[1] In the case at bar, under threat of a strike, the L&N submitted to the Adjustment Board for decision the precise claim that had been submitted to it by the General Chairman of the BLF&E (R. 17a, 30b, 91b, 142b-143b) and the District Court so found (R. 136a). At that time the question of outside earnings had not been discussed on the property in connection with the claim (R. 31b-34b), although the General Chairman had actual knowledge that the L&N adhered to the deduction principle in interpreting the agreement (R. 281b-282b, 287b). The existence or non-existence of outside earnings involve facts within the peculiar knowledge of the employee. L&N was required to submit the employee's claim to the Board in the exact language in which the claim had been submitted to it. It could not change the claim by adding anything that had not been submitted to it and discussed on the property.

for there the Court clearly stated (pp. 611-612, n. 10): "If an unfavorable award results in a strike the carrier may obtain injunctive relief. Railroad Trainmen v. Chicago River & I. R. Co., 353 U. S. 30. . . ."

Washington Terminal Co. v. *Boswell*, 124 F. 2d 235, affirmed by an equally divided Court, 319 U. S. 732, does not support Petitioners. The question in that case, as stated in 124 F. 2d at p. 239, was whether a carrier, which had been unsuccessful before the Adjustment Board, could maintain a suit under the Declaratory Judgment Act for a determination of its rights under the agreement during the time that the Railway Labor Act allowed the union or the employee to file an enforcement suit under Section 3 First (p) (45 U. S. C. 153 First (p)). *The Court specifically pointed out, at p. 247, that the question of whether or not a strike to enforce an award is lawful was not before the Court.* The Court of Appeals held that the carrier's suit for a declaratory judgment was impliedly prohibited by the Railway Labor Act because it defeated the plan set forth in that Act for a judicial determination under Section 3 First (p). The Court further stated (p. 240):

> "We do not think that Congress intended the Board's awards to be reviewable in this manner. The Railway Labor Act makes no provision for review as such. But it does set forth a definite and special scheme for securing judicial determination that the award is or is not in accordance with the legal rights of the parties. If the scheme is adequate constitutionally, as we think it is, we do not

believe Congress intended that it should be circumvented by free resort to other forms of judicial review or determination de novo of the merits of the controversy. . . . This is shown conclusively by the presence in the Railway Labor Act of the detailed plan for review. It is shown further by the character of the plan's details. We think these things show, too, that the method of review provided was intended to be exclusive."

The Court continued (p. 242):

"The entire statutory process has three distinct and primary stages: (1) direct negotiation between the disputants; (2) administrative determination; (3) judicial enforcement. While these are distinct, they are not independent. Each is related to the others as links in a chain or successive steps in a stairway leading to decision. . . ."

The Court further stated (p. 246):

"In all this there is no essential unfairness. Certainly there is none beyond the power of Congress to create in the regulation of such complex economic matters. The carrier is at full liberty to accept and comply with the award, or to reject and disregard it. If it chooses the latter course, the award has no effect upon its rights unless the employee institutes and succeeds in a suit to enforce it. If he does so, the carrier receives full constitutional protection in the suit."

It is clear from the language of *Washington Terminal Co.* v. *Boswell, supra*, that the judicial enforce-

ment provision of Section 3 First (p) of the Railway Labor Act is an integral part of the complete scheme for the final determination of minor disputes. In the light of the *Chicago River* case, *supra*, we submit that the protection of all phases of the procedures provided by the Act for the determination of minor disputes is equally important to avoid interruption of commerce and the consequent injury to the carrier and to the public.

We submit that the import of Petitioners' argument—that, by the enactment of the Railway Labor Act, Congress merely provided remedies for the final determination of minor disputes in the hope that the parties would make use of them—is unsound. No speculation need be exercised to ascertain the Congressional purpose in providing these remedies. Congress clearly stated that it intended ". . . to provide for the prompt and orderly settlement of all disputes" *in order* ". . . to avoid any interruption to commerce or to the operation of any carrier engaged therein". Section 2 (1), (4), (5) (45 U. S. C. Sec. 151a). The statute provides that the parties must make *every* reasonable effort to settle disputes in order to avoid interruptions to commerce. Section 2 First (45 U. S. C. Sec. 152 First). The co-author and sponsor of the Norris-LaGuardia Act, recognized that strikes could not be called until the procedures of the Railway Labor Act were exhausted. In discussing the applicability of his bill to railroads, Mr. LaGuardia recited the duties imposed by Section 2 First of the Railway Labor Act and said (75 Cong. Rec. 5504):

"There is the tie up between the provisions of the railroad labor act and the necessity of exhausting every remedy to adjust any difference which might arise. The workers *could not* and would not think of going on strike before all the remedies provided in the law have been exhausted." (Emphasis added).

It is true that the Act does not command or compel the filing of an enforcement suit, and, in this sense, the provisions of Section 3 First (p) are voluntary. The "compulsions go only to insure that those procedures are exhausted before resort can be had to self-help". *Elgin, J. & E. Ry. Co.* v. *Burley, supra.* Section 3 First (p) is such a remedy specifically provided for the kind of dispute involved here over compliance with an award of the Adjustment Board. The enforcement machinery of Section 3 First (p) was selected by Congress in 1934 as an appropriate and fair substitute for strikes to enforce awards.

5. The Legislative History and Contemporary Understanding of the Railway Labor Act Support the Decisions Below.

We respectfully submit that the legislative history and contemporary understanding of the Railway Labor Act support the decisions below. Petitioners have devoted 25½ pages of their 63½ page brief, as well as all 73½ pages of their appendix to brief, a large part of which is really argument, to their contention that all of the legislative history does not support the L&N's contention. They frankly admit, however, that

"We agree that the statements quoted [in L&N's brief opposing certiorari] do perhaps indicate an understanding that is in line with L&N's contention in this litigation" (Br. 37).

Petitioners have quoted from the testimony of carriers' representatives A. P. Thom and Daniel Williard given in the hearings held before the Senate Committee of Interstate Commerce, Sixty-Ninth Congress, First Session, in connection with S. 2306 which became the original Railway Labor Act in 1926. Those quotations are given to demonstrate that the original Railway Labor Act was not intended to take away the right of employees to strike. A reading of the entire record of that hearing shows that almost all of the discussion relative to the bill was in connection with major disputes, the making of agreements, and whether or not the interests of the public were properly protected, and that very little of it related to minor disputes involving the application and interpretation of those agreements.

That record shows that it was both the opinion and hope of both the railroads and their employees that the Act would cause peaceful solutions of their disputes and prevent interruption of transportation with the resultant injury to the public.

However, later experience showed that the machinery provided for by the 1926 Act for the solution of minor disputes was not as effective in solving such minor disputes as it had been thought it would be. The ineffectiveness of the 1926 Act in resolving such disputes and the need for drastically changing the ma-

chinery and procedure for peacefully solving them have been recognized by this Court. In the case of *Union Pacific R. Co.* v. *Price*, 360 U. S. 601, 610-612, the Court said:

> "But the 1926 Act provided no sanctions to force the carriers and their employees to make agreements establishing adjustment boards and many railroads refused to participate on such boards or so limited their participation that the boards were ineffectual. Moreover, the boards which were created were composed of equal numbers of management and labor representatives and deadlocks over particular cases became commonplace. Since no procedure for breaking such deadlocks was provided, many disputes remained unsettled. As reported to Congress in 1934 by Mr. Eastman, Federal Coordinator of Transportation: 'Another difficulty with the present law [the 1926 Act], even where an adjustment board has been established, is that, although its decisions are final and binding upon both parties, there can be no certainty that there will be a decision.' Hearings before Senate Committee on Interstate Commerce on S 3266, 73d Cong., 2d Sess., p. 17. Strike threats became frequent in an atmosphere of mutual recriminations which presented the danger of creating the very strife which the statute had been designed to avoid. Mr. Eastman reported to the House Rules Committee: 'Grievances on a number of roads in the past few years have accumulated to such an extent that the only remedy the men could see was to threaten a strike and thus secure appointment by the President of a fact-finding board which could go into the whole situ-

ation. That has happened on several occasions. Some of these grievances have accumulated up into the hundreds on the various roads and when the situation finally became intolerable the men would threaten a strike. . . .' Hearings before the House Rules Committee, 73d Cong., 2d Sess., p. 25; see also p. 14; see also Hearings before the Senate Interstate Commerce Committee, 73d Cong., 2d Sess., p. 17; and see Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 725-726.

"The railroad labor organizations were particularly dissatisfied. They urged that effective adjustment of grievances could be attained only by amendments to the 1926 Act that would establish a National Adjustment Board in which both carriers and employees would be required to participate, that would permit an employee to compel a carrier to submit a grievance to the Board, that would provide for a neutral person to break deadlocks occurring when the labor and management representatives divided equally, and, finally, that would make awards binding on the parties and enforceable in the courts, when favorable to the employees. These views prevailed in the Congress and resulted in the 1934 amendments which *drastically changed* the scheme of the Act. . . ." (Emphasis added.)

Petitioners have endeavored to show by quotations from Hearings before the Committee on Interstate Commerce, United States Senate, Seventy-Third Congress, Second Session, in connection with S. 3266, and Hearings before the Committee on Interstate

and Foreign Commerce, House of Representatives, Seventy-Third Congress, Second Session, on H.R. 7650, that the 1934 amendments to the Railway Labor Act were not intended substantially to change the Act in so far as they related to the adjustment of minor disputes. It is evident from the *Price* case that this Court does not share Petitioner's view and properly stated that the 1934 amendments *drastically changed* the 1926 Act in the statutory handling of minor disputes.

One of the principal reasons for the 1934 amendments was to eliminate strikes over minor disputes. As stated in the House Report:

> "The second major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as grievances which develop from the interpretation and/or application of the contracts between the labor unions and the carriers. . . . These unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment. . . . This condition should be corrected in the interest of industrial peace and uninterrupted transportation service." (H.R. Rep. No. 1944, 73d Cong., 2d Sess., pp. 2-3.)

Among other things, the 1934 amendments added Section 3 First (p), which made Adjustment Board awards enforceable in court. This remedy was not contained in the Railway Labor Act of 1926. When ques-

tioned about the right to strike after a decision by the Adjustment Board, Commissioner Joseph B. Eastman, Federal Coordinator of Transportation, stated:

> ". . . there ought not to be strikes with reference to minor grievances of that sort. I should be very unwilling to take away from the employees the right to strike on major issues, but these are not major issues." (Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7650, 73d Cong., 2d Sess., p. 61).

The following answer was made by Commissioner Eastman to this question by Congressman Pettingill:

> "Mr. Pettingill: Your interpretation there, Mr. Commissioner would be that under the language at the bottom of page 17, although the individual may be free to walk out, the organization would not be free to call a strike after an award had been made on these matters that are covered by the language at the bottom of page 17.
>
> "Commissioner Eastman: Well, that is my understanding; yes, sir." (House Hearings, p. 59.)

Petitioners have stated (Br. 48) that there were three situations not discussed at any time during the hearings: (1) grievances which had not been submitted by either party to the Adjustment Board, (2) grievances which have been submitted to the Adjustment Board and are awaiting decision, and (3) grievances which have been decided by the Board

and an award favorable to the employee has been obtained but the carrier has declined to comply with such an award. The crux of their argument is not that the legislative history directly supports their position but that Congressional discussion did not dwell on these three situations and, thus, they conclude that it is inconceivable that strikes in such situations were prohibited. Such alleged silence seems a dubious reason for construing a statute to exclude all situations or cases not discussed while the bill was being considered. Please see *Russell Co.* v. *United States,* 261 U. S. 514, 522-523. As we have seen earlier, Petitioners' argument concerning the alleged silence of Congress in the second situation above—grievances which have been submitted to the Adjustment Board and are awaiting decision—has already been rejected by this Court in *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.,* 353 U. S. 30.

Moreover, it is understandable why much of the discussion dealt with strikes against Adjustment Board awards unfavorable to employees. In this situation a strike would be the only recourse a union has since the Act made no provision for judicial review of awards unfavorable to employees. The denial of the right to strike where an employee has no other recourse was a matter of particular concern to some Congressmen. Where employees have the right to sue for enforcement of favorable awards without the payment of costs, the prohibition against strikes was not drastic and there was much less reason for extended comment

or questioning. When Commissioner Eastman was asked about enjoining strikes over awards, he answered:

> "I cannot tell you what the legal procedures would be in enforcing the award, where it is against the employee. *Paragraph (p)* [*Section 3 First (p)*] *covers the case where the carrier does not comply with the order of the adjustment board.*" (Emphasis added; House Hearings, p. 60.)

Mr. Carmalt, Legal Advisor to Commissioner Eastman, specifically advised the House Committee that the implication lay, from the form of the bill, that a strike on account of minor grievances would not be permitted and could be enjoined. Mr. Carmalt testified during the same Congressional hearings on the 1934 amendments as follows:

> "Mr. Wolverton: Is it your opinion that there should be such a provision in the bill or not?"
>
> . . . . . .
>
> "Mr. Carmalt: My opinion is that there should not be the right to strike over grievances of this kind where the Government has provided the machinery whereby the grievances may be considered by an impartial board."
>
> "Mr. Wolverton: Do you think that the language that has been referred to by Mr. Eastman, as conferring this absolution, so to speak, so far as an employee is concerned, would provide equal protection to the organization itself?"

"Mr. Carmalt: No, I think this injunction would run, rather as against a strike. There is no other means of resisting the order. But, as to the individual quitting, I think the absolution would be effective."

"Mr. Wolverton: Do you think that the absolution that has been given the employee should likewise be given to the organization?"

"Mr. Carmalt: Oh no."

"Mr. Wolverton: What?"

"Mr. Carmalt: No."

"Mr. Wolverton: What did you say?"

"Mr. Carmalt: No. The employees, in their drafting of the bill, put that absolution in, and in redrafting the bill we took the language of the present act which would not give that absolution to the organization."

"Mr. Wolverton: *So then you assume that under the provision of this bill an injunction could issue to prevent an organization from going on strike?*"

"Mr. Carmalt: *Such an injunctive process as might be necessary to prevent the strike growing out of the settlement of grievances under Section 3, I should believe would lie.*"

"Mr. Wolverton: Then the bill has been drawn purposely so that it would have that effect, so far as the organization is concerned but not so far as the individual is concerned?"

"Mr. Carmalt: I would not say that it gives any authority in that regard, because it was assumed that would be true, but there has been no discussion of it until this morning." (Emphasis added; p. 63.)

We submit that the Congressional record defeats Petitioners' argument here made. The Committee was advised that the language used in the amendments would justify the use of the injunctive process. This fact was brought squarely to the attention of Congress. By allowing the amendments to remain in this form, it is evident that the Congressional intent was to prohibit such strikes by means of an injunction. Certainly, the Supreme Court in the *Chicago River* case, *supra*, interpreted similar language in the Congressional hearings in the same way.

In the Senate hearings on the proposed amendments, Mr. George Harrison, President of the Brotherhood of Railway Clerks, was the leading spokesman for the brotherhoods. He stated:

> "These railway labor organizations have always opposed compulsory determination of their controversies. We have lived a long time and got a lot of experience and we know that these minor cases that develop out of contracts that we make freely, and which we have the right and privilege of entering into and have something to say about their terms we are now ready to go to a board and get them determined and that is a contribution that these organizations are willing to make." (Hearings before the Senate Committee on Interstate and Foreign Commerce on S. 3266, 73d Cong., 2d Sess., p. 35.)

The representatives of the International Brotherhood of Teamsters had vehemently objected in the Hearings before the House of Representatives to the adoption of Section 3 First, and stated:

"We are unalterably opposed to paragraph M, . . . [which] brings about compulsory arbitration and prevents the use of the only weapon in the hands of organized labor. We believe that a very dangerous precedent would be established with the passage of this paragraph, and to the best of our knowledge it is the first time that any such measure has been enacted by the Congress of the United States." (House Hearings, p. 118.)

The understanding of the railway labor organizations in 1934, when the amendments were passed, is shown by an article written by George Harrison in the October, 1934, issue of the *American Federationist*. Mr. Harrison pointed out that under the new law, Adjustment Board awards were enforceable in court:

"The power to enforce decisions of the National Board of Adjustment has been criticized by some on the ground that it constitutes compulsory arbitration. This is denied by the railway labor organizations, who point out that the National Board of Adjustment has jurisdiction only over grievances that arise out of the application and interpretation of rules. The settlement of such grievances and the enforcement of decisions of the adjustment board is merely applying the judicial process to the adjudication of grievances. The fundamental proposition of *changes* in wages, hours and working conditions is still a matter of direct negotiation between the carriers and the unions representing the employees. The mediation and arbitration provisions of the original Railroad Labor Act remain intact, and arbitration in

these matters is purely voluntary." (p. 1057) (Italics in original.)

If Sections 3 First(i) and (p) were intended to be merely voluntary remedies which the unions could ignore, Mr. Harrison would have so stated in answer to the criticism of compulsory arbitration. Instead, he defended these provisions by saying that they applied only to minor disputes; that enforcement of decisions of the adjustment board is merely applying the judicial process to the adjudication of minor disputes; but that arbitration of *major disputes* was still "purely voluntary". Mr. Harrison appeared at both the Senate and House hearings on the 1934 amendments as Chairman of the legislative committee of the Railway Labor Executives' Association.

Petitioners refer (Appendix to Petitioners' Brief 1-2, 62-73) to the hearings on the Donnell Bill (S. 3463) in 1950 and quote from statements made sixteen years after Section 3 First (p) was enacted. The argument is made that the subsequent legislative development shows that a strike to enforce an award of the Adjustment Board was not made unlawful by the 1934 amendments to the Railway Labor Act. This Court has repeatedly held that subsequent legislative history is of no value in the construction of earlier statutes. *Gemsco, Inc.*, v. *Walling*, 324 U. S. 244, 265; *Order of Railway Conductors of America* v. *Swan*, 329 U. S. 520, 529. Such statements, made 16 years after the 1934 amendments, do not constitute "contemporaneous comment" of value in construing the 1934 statute.

Please see *United States* v. *Ramley*, 345 U. S. 41, 48; *United States* v. *United Mine Workers*, 330 U. S. 258, 281-282; *Fogarty* v. *United States*, 340 U. S. 8, 13-14. The soundness of this rule is evident by the 1950 statement of Mr. Fort, quoted by Petitioners (Br. 19), that the 1934 Act "does not forbid strikes in connection with disputes falling within the jurisdiction of the Adjustment Board". This was subsequently shown to be erroneous in the *Chicago River* case, *supra*. It is also interesting to note that, in the *Chicago River* case, this Court refused to consider a similar argument based upon the same 1950 hearings on which Petitioners now rely.

The statement of Mr. DeButts quoted by Petitioners (Br. 20) reveals that the Donnell Bill, opposed by employee representatives, would have amended Section 3 of the Railway Labor Act by providing that *any party* aggrieved by an unfavorable award of the Adjustment Board would have the right to institute suit to have the award reviewed; it also would have made reports of Emergency Boards conclusive and binding upon the parties and enforceable by judicial proceedings. The purpose of the Donnell Bill clearly and undeniably was to provide for the peaceful determination of *all* disputes, prohibiting, as it would have, strikes and lock-outs involving *any* type of controversy. The Donnell Bill and the failure of Congress to enact it have no relevance here.

Petitioners have called this Court's attention to the cases of *Carpenters' Union* v. *N.L.R.B.*, 357 U. S. 93 and *N.L.R.B.* v. *Drivers Local Union*, 362 U. S. 274,

warning that Courts should not promulgate "a *policy which Congress did not declare*, or, we may say, *which Congress refrained from declaring*" (Their emphasis.) We agree that "The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted," as stated by this Court in the *Carpeters* case, *supra*. However, the judicial function of ascertaining Congressional intent is not limited to what Congress expressly declares but, as we will hereafter show (pp. 62-65), it must embrace what the Congress has implied.

We accordingly respectfully submit that the legislative history of the 1934 amendments, together with the wording of the statute, show beyond doubt that it was the intention of Congress that the exclusive remedy for the enforcement of Adjustment Board awards was to be a judicial enforcement and not an interruption to commerce to the detriment of the public. That is as true as it is plain that Congress intended that an injunction would lie to prevent a strike while a minor dispute was pending before the Adjustment Board as found by this Court in the case of *Brotherhood of R. Trainmen* v. *Chicago River and I. R. Co.*, 353 U. S. 30; as true as it is that an injunction will lie to prevent a strike before the handling prerequisite to taking a case to the Adjustment Board, as found by the Court in *Louisville & N. R. Co.* v. *Brown*, 252 F. 2d 149 (C.A. 5), cert. den. 356 U. S. 949; and as true as it is that an injunction will lie to prevent a strike over an unfavorable award. *Union Pacific R. Co.* v. *Price*, 360 U. S. 601, pp. 611-612, n. 10.

6. The BLE, ORC&B and BRT May Not Lawfully Strike to Assist BLF&E Pursuant to an Agreement of the Four Brotherhoods to Cooperate in All Complaints in Respect to the Enforcement of Awards of the National Railroad Adjustment Board.

BLE, ORC&B and BRT seek to justify their calling of a strike in this case by asserting (Br. 5-6) that L&N announced its intention "to henceforth deduct outside earnings" which "was, in effect, an attempt to unilaterally and unlawfully change the terms of the agreements between L&N and the respective unions." They also assert that the L&N stated that "they would adhere to their position and in the future L&N would deduct outside earnings in the settlement of Adjustment Board awards rendered in favor of employees within the crafts represented by the four general chairmen", citing in support thereof the affidavit of the general chairman of BLF&E.

The District Court, however, found contrary to the innuendo contained in that assertion. It did not find that the L&N had manifested a purpose to change its stand relative to outside earnings from what it had always been, but, to the contrary, found (R. 137a):

> "On May 17, 1958, the Director of Personnel of the L&N ordered that Fireman Humphries be restored to the service. On the same date the L&N, following a procedure it had followed in the past in such instances to obtain information for the purpose of deducting outside earnings, requested that Fireman Humphries furnish the carrier with

a statement of his earnings in other employment, if any, while out of L&N service. The General Chairman of the BLF&E was advised of this request by the L&N on the same date.

"It has been the consistent position of the defendants that outside earnings shall not be deducted, and it has been the consistent position of the plaintiff that outside earnings shall be deducted."

The District Court also found (R. 138a-139a):

"During July, 1958, conferences were held on the property of the L&N concerning the dispute as to the meaning and proper application of Award 18720. The General Chairman of the BLF&E invited the General Chairmen of the BLE, ORC&B and the BRT to attend these conferences.

"Fireman Humphries is a member of the craft or class known on the railroad as 'firemen' and he is a member of the BLF&E. His claim for reinstatement and back pay was submitted to the L&N by the BLF&E. The BLF&E alone represented Fireman Humphries before the Adjustment Board where the dispute involved only the provisions of the agreement between the L&N and the employees represented by the BLF&E. The BLF&E was the only labor organization that was a party to the dispute before the Adjustment Board in the case involving Award 18720.

"Representatives of the BLE, ORC&B and the BRT were invited to attend the July, 1958 conferences by the General Chairman of the BLF&E, pursuant to 'an agreement of the four Brotherhoods to cooperate in all complaints in respect to

the application of awards by the First Division of the National Railroad Adjustment Board'."

The record is clear that there was no pending dispute with BLE, ORC&B, or BRT involving whether, under their respective agreements, outside earnings could be deducted when the Adjustment Board ordered a BLF&E employee reinstated with pay for any time lost. Certainly, a statement by either a carrier or an employee representative that, should occasion for interpretation of a particular article of an agreement arise at some future time, they would interpret it in a certain way, is not a dispute such as is envisioned by the Railway Labor Act. That Act does not provide for the resolving of hypothetical cases. Certainly, a strike or lockout to resolve differences with respect to a hypothetical case should not be condoned.

Should a need arise for such an interpretation in an actual case at some time in the future, the matter should first be handled on the property in order to endeavor to reach a settlement, and a strike before the handling of it on the property would be illegal. *Louisville & N. R. Co.* v. *Brown,* 252 F. 2d 149 (C.A. 5), cert. den. 356 U. S. 949. Failing to reach an agreement on the property, either party could then submit the matter to the Adjustment Board and a strike would be illegal while it was pending before the Board. *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.,* 353 U. S. 30.

The real purpose of the threatened strike by BLE, ORC&B and BRT is clearly shown by the record to be

to assist in enforcing the award, without resort to the courts, in compliance with an earlier agreement between them. The letter of August 4, 1958, written by the General Chairman of BLE seeking approval of a strike vote said: "Following the unsuccessful handling of this dispute by the BLF&E, it was referred to the Chief Executives of BLE, BLF&E, ORC&B and BRT, pursuant to an understanding between them with respect to applying NRAB awards" (R. 215b). Additional evidence of the purpose is shown by the telegram from the National Mediation Board showing that the four organizations were striking "Account Refusal Of Carrier To Apply Award 18720 First Division NRAB." (R. 19b) and the telegram of the four General Chairmen advising that a strike was approved and authorized "Due To Carrier's Adamant Insistence That Outside Earnings of Fireman Humphries Must Be Deducted From Any Money Due Him Under Award 18720" (R. 21b). The same reason appeared, even after this suit was brought, for in their joint answer the Petitioners stated that BLF&E called upon the other organizations to join them "to induce the plaintiff to recede from its unjustified position and comply with the Board's award." (R. 23a); that strike authority was sought "as a protest against the action of plaintiff railroad and for the purpose of enforcing the award" (R. 24a); and that the L&N had been guilty of the "vicious and fraudulent purpose of imposing upon the jurisdiction of this Court in order that the plaintiff railroad might secure a temporary restraining

order to defeat a strike called solely because of the plaintiff's refusal to comply with the plain provisions of an award" (R. 26a).

After considering all the evidence in the case, the District Court found as a fact that the General Chairman of BLF&E called in the other Brotherhoods "pursuant to an agreement of the four Brotherhoods to cooperate in all complaints in respect to the application of awards by the First Division of the National Railroad Adjustment Board" (R. 139a).

It is thus crystal clear that the strike calls of those three organizations were in furtherance of that agreement rather than, as now asserted, due to an alleged statement of L&N as to what it proposed to do in the future should an occasion arise concerning the payment of any time lost under a similar Adjustment Board award.

Undoubtedly, the District Court was correct when, in its Conclusions of Law, it stated (R. 152a):

> ". . . The Court concludes that the BLE, ORC&B and the BRT, none of which represent Fireman Humphries and none of which were parties to any of the proceedings before the Board, cannot lawfully strike to enforce Award 18720, notwithstanding the provisions of any agreement that may exist among the four labor organizations to the contrary."

As the strike of BLE, ORC&B and BRT concerns no pending claims involving the agreements with BLE, ORC&B and BRT and no award involving them that

has not been complied with, there is no "labor dispute" involving them within the terms of the Railway Labor Act or the Norris-LaGuardia Act. Therefore, those unions have no right to strike and, were they to strike, they would not only interfere with interstate commerce but cause irreparable injury to the public and to the railroad.

We earnestly insist that the case of *Brotherhood of R. Trainmen* v. *New York Cent. R. Co.*, 246 F. 2d 114 (C.A. 6), cert. den. 355 U. S. 877, is controlling here. In that case the Court held:

> "It is not every dispute between an employer and employees that justifies the right to strike. . . . (p. 117)
>
> . . . . .
>
> ". . . The provision of the Railway Labor Act, above mentioned, does not contemplate any obligation on the part of the carrier to settle or arbitrate a controversy with a union that does not constitute a labor dispute. . . . (pp. 118-119)
>
> . . . . .
>
> "In the instant case the carrier sought protection from interference with its right, and the duty imposed by Congress upon railroad common carriers, to furnish facilities for passengers or freight, and to engage in interstate commerce, in the service of the public. Where such interference by strike over a controversy does not involve a labor dispute, and is not within the sanction of law, it may be enjoined to prevent great and irreparable injury to the public and to the railroad." (p. 122)

That a dispute may not be anticipated, but must await an actual occurrence of a problem in order to be a "labor dispute" under either the Railway Labor Act or the Norris-LaGuardia Act, was recognized by the Court of Appeals for the Sixth Circuit in that case when it quoted, with approval, the following from a District Court:

> "We believe that a labor dispute cannot be found over the closing of the North Toledo Yard by seeking to incorporate in that action the anticipatory results upon the employees. The latter is a separate and distinct problem that may be met when the time arrives." (p. 117)

Since the BLF&E—the only labor organization that is the collective bargaining representative of Fireman Humphries; the only organization whose agreement is involved in Award 18720; the only organization that handled the Humphries dispute on the property before its submission to the Board; the only organization that was a party to the proceedings before the Board; and the only organization authorized by Section 3 First (p) of the Act to bring an enforcement suit—may not strike to enforce the award, it is elementary, we submit, that other organizations may not strike to enforce that award.

7. The Construction of the Railway Labor Act Urged by Petitioners Would Defeat the Purpose and the Overall Statutory Scheme of the Act.

The crux of Petitioners' contentions is that they have a common law right to strike to enforce contract claims. Their position is that the Railway Labor Act is in derogation of common law rights and must be strictly construed, and that unless an express restriction on strikes is found in the Act, no prohibition may be inferred.

This reasoning is unsound in two respects. First, the right to strike to enforce claims under a contract is at least questionable under the common law. In discussing a strike brought to enforce a claim under a collective bargaining agreement, Mr. Justice Brandeis, speaking for a unanimous Court in *Dorchy* v. *Kansas*, 272 U. S. 306, stated (p. 311):

> ". . . a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court. Compare Guaranty Trust Co. v. Green Cove R. R., 139 U. S. 137, 143; Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109. To enforce payment by a strike is clearly coercion. . . . Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike. Compare Aikens v. Wisconsin, 195 U. S. 194, 204-5."

Petitioners' argument that, *in the absence of express prohibitions,* common law rights are unaffected by the Railway Labor Act is simply not true. In a number of different situations the Railway Labor Act has been held, *by implication,* to take away common law rights. A few examples will serve to demonstrate the basic error in petitioners' argument.

First, the railroads had a right at common law to negotiate with whomever they pleased in dealing with their employees. But in *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, the Railway Labor Act was held to prohibit, *by implication,* all negotiations by a carrier with anyone other than the representative of its employees designated by the National Mediation Board. The express affirmative obligation in Sec. 2 Ninth to "treat with" the designated representative, when "read in the light of the declared purposes of the Act", was held to imply the negative duty to treat with no other organization, and this duty was enforcible by injunction. 300 U. S. at p. 548.

Second, both employees and railroads had the right at common law to sue in court for a determination of disputes over grievances. Nothing in the Railway Labor Act expressly takes away this privilege. However, this Court has held that the Act, *by implication,* confers exclusive jurisdiction over these disputes on the National Railroad Adjustment Board and forbids suits in a District Court prior to an adjudication by the Adjustment Board. *Slocum* v. *Delaware,*

L. & W. R. Co., 339 U. S. 239; *Order of Ry. Conductors* v. *Southern Ry. Co.*, 339 U. S. 255; *Pennsylvania R. Co.* v. *Day*, 360 U. S. 548.

Third, after the Adjustment Board issues an award, nothing in the Railway Labor Act prohibits a carrier from instituting an action for a declaratory judgment as to the validity of the award. Nevertheless, it has been held that such an action is prohibited, *by implication*, in Section 3 First (p). *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, affirmed by an equally divided Court, 319 U.S. 732.

Fourth, judicial review of decisions of the National Mediation Board has also been held to be forbidden by the Railway Labor Act *despite the absence of any express provision to that effect. Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297.[1]

Fifth, it may be assumed that railroad labor organizations had the right at common law to determine who would be among their membership, and, if they desired, to discriminate against Negroes in bargaining

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[1]It is significant to note also that in *Switchmen's Union* v. *National Mediation Board, supra*, this Court, in holding that Congress impliedly prohibited judicial review of the Mediation Board's ruling under Section 2 Ninth, did so because Congress, in the Railway Labor Act, made express provision for judicial review in only two instances, one being judicial review of Adjustment Board awards under Sec. 3 First(p) and the other involving judicial review under Sec. 9. This Court then stated (p. 306):

> ". . . When Congress in § 3 and in § 9 provided for judicial review of two types of orders or awards and in § 2 of the same Act omitted any such provision as respects a third type, it drew a plain line of distinction. And the inference is strong from the history of the Act that that distinction was not inadvertent. The language of the Act read in light of that history supports the view that Congress gave administrative action under § 2, Ninth a finality which it denied administrative action under the other sections of the Act."

collectively. The Brotherhood of Railroad Trainmen, pursuant to this alleged right, "continually carried on a program of aggressive hostility to the employment of Negroes." *Brotherhood of R. Trainmen* v. *Howard*, 343 U. S. 768, 771. *Although there is no specific provision in the Act preventing discrimination on the basis of race,* this Court held that the Trainmen's actions violated the Act and could be enjoined. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192; *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232.

Sixth, there is no provision of the Railway Labor Act which expressly prohibits strikes. Nevertheless, even Petitioners must admit that the Act has already been construed, in some cases, to prevent strikes until the remedies provided by the Act have been exhausted. See, *e.g., Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, 725; *Brotherhood of Railway and Steamship Clerks* v. *Railroad Retirement Board*, 239 F. 2d 37, 41, 42; *American Airlines, Inc.* v. *American Air Line Pilots Assn.*, 169 F. Supp. 777, 783-789 (S. D. N. Y.). These are cases involving "major disputes". And, most significantly here, *despite the absence of an express prohibition against strikes over "minor disputes"*, these have also been held illegal under the Railway Labor Act. *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30. As recent as 1959 in *Union Pacific R. Co.* v. *Price*, 360 U. S. 601, this Court stated (pp. 611-612, n. 10):

> "If an unfavorable award results in a strike the carrier may obtain injunctive relief. Railroad Trainmen v. Chicago River & I. R. Co., 353

U. S. 30; see Also Hearings before House Committee on Interstate and Foreign Commerce on H.R. 7650, 73d Cong., 2d Sess., pp. 58-65."

Thus, the Railway Labor Act has often been construed to prohibit strikes upon the basis of an implied prohibition. Far from giving a narrow construction to the Act, courts have frequently applied it broadly in order to fulfill the statutory purpose even in the absence of express language and even if such a construction abridged common law rights of the carrier or the union.

In support of their argument that they have a right to strike to enforce the money award, Petitioners have cited several cases. We submit that these cases are clearly inapplicable.

Petitioners rely upon *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Republic Steel Corp.* v. *N.L.R.B.*, 311 U. S. 7; *H. J. Heinz Co.* v. *N.L.R.B.*, 311 U. S. 514; *Carpenters' Union* v. *N.L.R.B.*, 357 U. S. 93; *Teamsters Union* v. *Oliver*, 358 U. S. 283; *Dowd Box Co.* v. *Courtney*, 368 U. S. 502 and *N.L.R.B.* v. *Katz*, 369 U. S. 736. None of these cases involved the question of the right to strike for the purpose of forcing the payment of a claim under an existing contract or for the purpose of enforcing a money award. Indeed, it is anomalous that all of the above cases except the *Oliver* and *Courtney* cases were statutory proceedings for the enforcement of orders of the National Labor Relations Board.[1]

[1]If any of these cases are regarded as analogous, then they serve only to demonstrate the manifest unfairness of permitting

(Footnote continued on following page)

Teamsters Union v. *Oliver, supra,* involved the question whether an Ohio antitrust statute could nullify a provision of a collective bargaining agreement made pursuant to the National Labor Relations Act. The Court, in *Dowd Box Co.* v. *Courtney, supra,* stated (p. 503): "The sole question presented by this case is whether this federal statute [Labor Management Relations Act of 1947] operates to divest a state court of jurisdiction over a suit for violation of a contract between an employer and a labor organization."

Petitioners' reliance upon *N.L.R.B.* v. *Insurance Agents' Int. Union,* 361 U. S. 477; *N.L.R.B.* v. *Drivers Local Union,* 362 U. S. 274 and *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 238, is also misplaced.

N.L.R.B. v. *Insurance Agents' Int. Union, supra,* involved the legality of union tactics under Sec. 8(b)(3) of the National Labor Relations Act during the period of collective bargaining for the making of a *new* agreement. *N.L.R.B.* v. *Drivers Local Union, supra,* involved peaceful "recognitional" picketing under the National Labor Relations Act, as amended by the Taft-Hartley Act. Neither of these cases involved the question of the right to strike to force the payment of money under an existing contract or to enforce a money award.

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the petitioners to strike. Please see, *e. g., Republic Steel Corp.* v. *N.L.R.B., supra,* where this Court refused to enforce the Board's order which would have prevented the employer from taking credit for outside earnings in the back pay award, and *N.L.R.B.* v. *Jones & Laughlin Steel Corp., supra,* where this Court stated (p. 47) that the Board's order requiring reinstatement and back pay "is subject to review by the designated court, and only when sustained by the court may the order be enforced."

Moreover, all of the foregoing cases involve the National Labor Relations Act or the Labor Management Relations Act. When this Court, under the Railway Labor Act, affirmed the granting of injunctive relief against a strike in *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30, it stated (pp. 31-32, note 2):

> "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act, 49 Stat. 449, as amended 29 U.S.C. Sec. 151 et seq., 29 U.S.C.A. Sec. 151 et seq. It is one of those differences which underlies the controversy in this case."

This Court recently emphasized this distinction in *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (Decided June 18, 1962), when it affirmed a denial of injunctive relief against a strike by employees under the Taft-Hartley Act and stated (p. 211, note 30):

> "The Court in Chicago River expressly recognized and rested its decision upon the differences between provisions for the settlement of disputes under the Railway Labor Act and the Taft-Hartley Act. Id. 353 U. S. at 31, 32, note 2."[1]

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[1]Other decisions of this Court cited by Petitioners, *Wilson* v. *New*, 243 U. S. 332, and *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, both discussed *infra*, emphasize that Congress and this Court have long recognized the distinction between rail carriers and their employees and other employers and their employees who are not engaged in a business charged with a public interest.

Petitioners also rely upon *Brotherhood of R. Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50; *Chicago, Rock Island & Pac. R. Co.* v. *Switchmen's Union*, 187 F. Supp. 581 (W.D. N.Y.); *Elgin, J. & E. Ry. Co.* v. *Brotherhood of R. Trainmen*, 196 F. Supp. 158 (N.D. Ill), and *Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330. None of these cases supports Petitioners' position here. They all involved major disputes and, thus, they provide no support for the alleged right to strike for the purpose of enforcing a money award of the Adjustment Board.

General Committee v. *Missouri-K.-T. R. Co.*, 320 U. S. 323, also cited by Petitioners, involved a jurisdictional dispute between the BLE and BLF&E. The Court held that Section 2 Ninth (45 U.S.C. Sec. 152 Ninth) gave the National Mediation Board an adjudicatory function in the settlement of jurisdictional or "representation" disputes and impliedly prohibited judicial review of that Board's decision in such matters. This Court concluded that the Courts had no jurisdiction to decide or to review the Mediation Board's rulings in such representation disputes. Of course, the present case does not involve such a jurisdictional dispute. The Railway Labor Act contains no provision for judicial review of such Mediation Board's orders, but the Act does contain an express provision for judicial review of Adjustment Board orders. *Cf. Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, discussed earlier in this brief at page 63, note 1.

Petitioners' argument (Br. 14-36)—that the decision of the Courts below defeat and will bring to an end the Congressional policy of requiring the settlement of grievances by the collective bargaining process—is without any merit. L&N has devoted a major portion of its brief in reviewing the language of the Railway Labor Act, as amended in 1934, relating to the procedures established there for the handling and adjudication of minor disputes and in reviewing the legislative history of these 1934 Amendments. L&N has shown that the Petitioners' major premise—that the Congressional policy left the settlement of minor disputes in the realm of collective bargaining—is without foundation. Some further discussion concerning the point may be helpful.

The major premise of Petitioners' argument is that the right to strike to effect a desired settlement of a minor dispute is the prime ingredient in the collective bargaining process. We submit that what this Court, in *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, said in condemning the argument of the Petitioner in that case can be applied in *ipsa verba* to the principal argument of Petitioners here. At page 739 this Court held:

> "Petitioner's contrary view, as has been indicated, regards the settlement of grievances as part of the collective bargaining power, indistinguishable from the making of collective agreements. *The assumption ignores the major difference which the Act has drawn between those functions, both in defining them and in the modes* provided for settlement.

"To settle for the *future* alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract 'concerning rates of pay, rules, or working conditions.' It includes the power to make a new agreement settling for the *future* a dispute concerning the coverage or meaning of a pre-existing collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.

"But it does not cover changing them with *retroactive* effects upon *accrued rights* or claims. For it is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued which marks *the stautory boundary between collective bargaining and the settlement of grievances.*" (Emphasis ours.)

The Congressional policy, as expressed by the 1934 Amendments, was to leave the disposition of major disputes in the realm of conciliation, mediation and voluntary arbitration. It is equally certain that the Congress provided administrative and judicial machinery for the disposition of minor disputes. It placed these minor disputes in the adjudicatory channel and invoked the compulsions of the law. Congress established compulsory arbitration in this limited field. *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30.

The Congressional policy in the handling of minor disputes under the provisions of the Railway Labor Act is vindicated—not thwarted—by the decisions below. These decisions do not affect the requirement of Sec. 3 First (i) (45 U.S.C. 153 First (i)) concerning the conferences between representatives of the carrier and the employee in an effort to amicably resolve a minor dispute. This first step in the statutory plan was the point involved in *Louisville & N. R. Co.* v. *Brown*, 252 F. 2d 149 (C.A. 5), cert. den. 356 U. S. 949. But, failing to reach an agreement in this manner, the dispute may be submitted to the Adjustment Board, the Board's decision being final and binding except insofar as it pertains to a money award. The second step in this statutory plan is preserved by *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30. The third step in the statutory plan—that of judicial review of the Board's award under Sec. 3 First (p)—is preserved by *Brotherhood of R. Trainmen* v. *Denver & Rio Grande W. R. Co.*, 290 F. 2d 266 (C.A. 10), cert. den. 366 U. S. 966, reh. den. 368 U. S. 873, and by the decisions below.

Since the union does not have exclusive statutory power to settle grievances by agreement, *Elgin, J. & E. Ry. Co.* v. *Burley, supra,* it would be strange indeed if it could be held to have the greater legal power to impose its own will in the same matter. If the union may impose, by strike, its own interpretation of a rule upon a carrier in effecting the settlement of an individual dispute, it is obvious that the carefully preserved rights of the individual employee are liable to

incidental obliteration. That the Act intends that the employee shall continue to possess an effective voice in the settlement of grievances affecting him is well established. This Court ruled very pertinently upon this point in the *Burley* case when it stated (pp. 733-734):

> "The unions, apparently, like petitioner in this case, interpret the Act as not contemplating two distinct systems for the settlement of disputes, one wholly collective for major disputes, the other wholly individual for minor ones. In this view the collective agent becomes a party to the collective agreement by making it and its interest as representative of the collective interest does not cease when that function ends. It remains a party to the agreement, as such representative, after it is made; and consequently, in that capacity and for the protection of the collective interest, is concerned with the manner in which the agreement may be interpreted and applied.
>
> "Accordingly, petitioner urges that the statute, both by its terms and by its purpose, confers upon the collective agent the same exclusive power to deal with grievances, whether by negotiation and contract, or by presentation to the Board when agreement fails, as is given with respect to major disputes. And the aggrieved employee's rights of individual action are limited to rights of hearing before the union and possibly also by the carrier.
>
> "We think that such a view of the statute's effects, in so far as it would deprive the aggrieved employee of effective voice in any settlement and of individual hearing before the Board, would be

contrary to the clear import of its provisions and to its policy.

"It would be difficult to believe that Congress intended, by the 1934 amendments, to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency, not only in forming the contracts which govern their employment relation, but also in giving effect to them and to all other incidents of that relation. Acceptance of such a view would require the clearest expression of purpose. For this would mean that Congress had nullified all preexisting rights of workers to act in relation to their employment, including perhaps even the fundamental right to consult with one's employer, except as the collective agent might permit. Apart from questions of validity, the conclusion that Congress intended such consequences could be accepted only if it were clear that no other construction would achieve the stautory aims."

In connection with their arguments against compulsory arbitration, Petitioners cite *Wilson* v. *New*, 243 U. S. 332, and *Wolff Co.* v. *Industrial Court*, 262 U. S. 522. Neither of these cases is applicable.

Wilson v. *New, supra,* involved the power of Congress under the commerce clause of the Constitution to enact legislation establishing an eight-hour day and a scale of minimum wages for a limited period for employees of carriers engaged in interstate and foreign commerce. This Court held that the statute was within the power of Congress under the commerce clause. *Wolff Co.* v. *Industrial Court, supra,* involved the con-

stitutionality of a Kansas statute which provided for compulsory arbitration of all industrial disputes in the food, clothing and fuel industries before a Court of Industrial Relations from which an employer even had to obtain permission to go out of business. The state relied upon *Wilson* v. *New, supra,* as authority for the state action. This Court held that the Kansas statute violated the Fourteenth Amendment.

These two cases cited by Petitioners only serve to show that the Congress and this Court have long recognized a distinction between governmental power to control *public* carriers and its employees and governmental power to control private employers and its employees. In *Wilson* v. *New, supra,* this Court pointed out that by engaging in the business of an interstate carrier, a railroad subjects itself to the lawful power of Congress to regulate irrespective of the source of the carrier's existence; and by engaging in a business charged with a public interest, "all the vast property and every right of the carrier become subject to the authority to regulate possessed by Congress." This Court then stated (pp. 352-353):

> "*As to the employee.* Here again it is obvious that what we have previously said is applicable and decisive, since whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in

a business charged with a public interest and as to which the power to regulate commerce possessed by Congress applied and the resulting right to fix in case of disagreement and dispute a standard of wages as we have seen necessarily obtained.

"In other words, considering comprehensively the situation of the employer and the employee in the light of the obligations arising from the public interest and of the work in which they are engaged and the degree of regulation which may be lawfully exerted by Congress as to that business, it must follow that the exercise of the lawful governmental right is controlling. . . ." (Court's emphasis.)

In *Wolff Co.* v. *Industrial Court, supra,* this Court again emphasized the public interest involved in cases involving common carriers when it stated (pp. 543-544):

"But the chief and conclusive distinction between *Wilson* v. *New* and the case before us is that already referred to. The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss, *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U. S. 396; *Bullock* v. *Railroad Commission,* 254 U. S. 513, it may give up its franchise and enterprise, but short of this, it must continue. Not so the owner when by mere changed conditions his busi-

ness becomes clothed with a public interest. He may stop at will whether the business be losing or profitable.

"The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce, furnishes no precedent for regulation of the business of the plaintiff in error whose classification as public is at the best doubtful. . . ."

Both of the foregoing cases involve the question of the *power* of Congress or of a legislature to provide for compulsory arbitration in the field of *major* disputes. A *minor* dispute is all that is involved in the case at bar and nowhere do the Petitioners question the *power* of Congress to provide compulsions for the orderly and peaceful disposition of minor disputes.

Petitioners contend (Br. 32-34) that, if the decisions of the Courts below are affirmed, compulsory arbitration of major disputes in the railway industry will follow; that "it will be but a short and near—inevitable step to extend the same process to all industry"; that when this occurs, the government, by decree, will establish the amount of wages that workers shall receive and that thereafter prices will be set by government fiat. Petitioners then state (Br. 34): "And the next proposition that cannot fail to command the attention of the law makers will be, how far behind the regulation of wages and prices by government should there follow the institution of government own-

ership of the tools of production and services?" They attribute these consequences to the decisions below and state that "they represent a first decisive step *away* from the principles and institutions which in the past have distinguished this Nation from most of the other Nations of the World."

Suffice it to say that, if such events should ever occur in this country, it certainly cannot be attributed to the decisions below which merely insure compliance with a Congressional policy to settle minor disputes by methods analogous to long established judicial procedures for construing and enforcing contracts. What has attributed to this Nation's greatness has been and is today its Constitutional regard for due process of law. It is inconceivable that Congress, by providing for judicial review, in a United States District Court, of awards of the Adjustment Board, has committed this Nation to a course in the direction of socialism. Judicial review of administrative action is the rule, not the exception and is the only real guarantee against arbitrary governmental action.

The decisions of the Courts below *promote* the Congressional policy for the orderly and peaceful disposition of minor disputes through the adjudicatory channel by the administrative and judicial machinery provided by Congress in this limited field. They protect the interests of the public, the carrier and of individual employees.

There is a statutory boundary between collective bargaining in the field of major disputes and the area embracing the settlement of a grievance. It is not the

function of collective bargaining in this limited area of minor disputes to *force* an interpretation of an existing agreement upon a carrier which counsel have candidly conceded would probably not withstand the test of judicial scrutiny in a United States District Court.

Collective bargaining to be successful must result in the making of real contracts, binding as such on all the parties and to be enforced as written. If the union can dictate the result of a dispute over the interpretation of the agreement by economic warfare, rather than by law and reason exercised in the adjudicatory channel expressly provided by Congress for such disputes, then what was intended in the first instance to be an agreement is converted into a mere deceptive bit of paper and collective bargaining thwarted of its essential purpose.

B. THE NORRIS-LaGUARDIA ACT DOES NOT DEPRIVE THE COURT OF JURISDICTION TO PREVENT A STRIKE CALLED FOR THE PURPOSE OF ENFORCING A MONEY AWARD OF THE ADJUSTMENT BOARD.

We do not believe it necessary to labor the point that the Norris-LaGuardia Act does not deprive the Court of jurisdiction to issue an injunction to prevent a strike, the purpose of which is to enforce an award of the National Railroad Adjustment Board. The Petitioners have virtually conceded, in their brief, that the Court has such jurisdiction, as exemplified by this statement (Br. 62):

> "The fabric of the Norris-LaGuardia Act has been shredded by so many exceptions and qualifications in the course of the many judicial interpretations made of the Act, that to discover what remains of the Act and to argue its applicability to the circumstances of the instant case would require an unwarranted lengthening of this brief."

We are heartily in accord with Petitioners' apparent opinion that, under the applicable court opinions, the Norris-LaGuardia Act does not take away the Court's jurisdiction in the instant case. However, we certainly do not agree that the Courts have "shredded" that Act. We cannot understand such an accusation when Congressman LaGuardia himself, the co-author and sponsor of the Norris-LaGuardia Act, stated:

> "There is the tie-up between the provisions of the railroad labor act and the necessity of exhausting every remedy to adjust any difference which might arise. The *workers could not* and would not think of going on strike before all the remedies provided in the law have been exhausted." (75 Cong. Rec. 5504.) (Emphasis added.)

We submit that this Court has correctly construed the intent of Congress. In *Brotherhood of R. Trainmen* v. *Howard*, 343 U. S. 768, 774, the Court stated:

> "Our conclusion is that the District Court has jurisdiction and power to issue necessary injunctive orders [to enforce compliance with the re-

quirements of the Railway Labor Act] notwithstanding the provisions of the Norris-LaGuardia Act."

In the case of *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 563, the Court said:

> "It suffices to say that the Norris-LaGuardia can affect the present decree only so far as its provisions are found not to conflict with those of § 2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act."

The Court carefully considered the Norris-LaGuardia Act in the case of *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30, 40, and held:

> "We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable."

We submit that the lower Courts correctly held that they had the jurisdiction and power, notwithstanding the provisions of the Norris-LaGuardia Act, to enjoin the strike to enforce Award 18720 of the National Railroad Adjustment Board.

C. THE DECISIONS OF THE COURTS BELOW ARE SUPPORTED BY JUDICIAL PRECEDENT.

In 1957 this Court decided the *Chicago River* case (*Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30), holding that a strike over a dispute pending before the Adjustment Board was properly enjoinable. In that case the Court noted that the "lack of compulsion toward a settlement" of minor disputes was a "major weakness" of the 1926 Railway Labor Act which Congress decided to correct by the 1934 amendments (p. 35). The Court held (p. 39):

> "This record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field. Our reading of the Act is therefore confirmed, not rebutted, by the legislative history."

The decision of this Court in *Manion* v. *Kansas City Terminal*, 353 U. S. 927, teaches that the statutory scheme provided by the Railway Labor Act for the settlement of minor disputes must be complied with, for an injunction prohibiting a strike was held to be improper until such time as the provision for submitting the dispute to the Adjustment Board had been complied with by the railroad.

Our analysis of the *Manion* case is in accord with the opinion of the Court of Appeals for the Seventh

Circuit as shown by the case of *Hilbert* v. *Pennsylvania Railroad Company*, 290 F. 2d 881, cert. den. 368 U. S. 900. There the Court said (pp. 885-886):

> 'In Manion v. Kansas City Terminal Ry. Co., 353 U. S. 927, 77 S. Ct. 706, 1 L. Ed. 2d 722, the Court, in a per curiam opinion, vacated an injunction granted by a state court in a minor dispute because the dispute was not pending before the Adjustment Board. We think the decision in Manion means that a court should not permit the use of its injunctive powers in cases involving minor disputes where such disputes could have been submitted to the Adjustment Board."

In the case of *Louisville & N. R. Co.* v. *Brown*, 252 F. 2d 149 (C.A. 5), cert. den. 356 U. S. 949, a strike had been called over a minor dispute and before that dispute had been handled on the property, which is a step in the statutory scheme of the Act for the settlement of minor disputes, and a prerequisite to taking a dispute to the Adjustment Board. The Court commented that neither party could take the dispute to the Adjustment Board since it had not as yet been handled on the property and held:

> ". . . We think that in that posture of affairs the principle of Chicago River would apply and that had an injunction been sought because the strike was illegal, it would lie to prevent the frustration of the statutory grievance-adjustment procedure." (p. 154)

In the case of *Union Pacific R. Co.* v. *Price*, 360 U. S. 601, the Court clearly stated (pp. 611-612, n. 10):

"If an unfavorable award results in a strike the carrier may obtain injunctive relief. Railroad Trainmen v. Chicago River & I. R. Co., 353 U. S. 30. . . ."

While this Court, in the case of *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, held that the Railway Labor Act made no provision for judicial review of certifications by the National Mediation Board, the Court explicitly pointed out that this was not true concerning awards of the Adjustment Board. The Court stated (p. 305):

"That conclusion is reinforced by the highly selective manner in which Congress has provided for judicial review of administrative orders or determinations under the Act. There is no general provision for such review. But Congress has expressly provided for it in two instances. Thus Congress gave the National Railroad Adjustment Board jurisdiction over disputes growing out of 'grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.' § 3, First(i). The various divisions of the Adjustment Board have authority to make awards. § 3, First(k)-(o). And suits based on those awards may be brought in the federal district courts. § 3, First (p). In such suits the 'findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated.' . . ."

Indicative that judicial review is to be the sole remedy, the Court also stated:

". . . All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. *Tutun* v. *United States*, 270 U. S. 568, 576-577. In such a case the specification of one remedy normally excludes another. . . ." (p. 301)

This latter principle was reaffirmed in *Union Pacific R. Co.* v. *Price*, 360 U. S. 601, 608, when the Court said:

". . . Furthermore, we have said of the Railway Labor Act that 'the specification of one remedy normally excludes another.' *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 301. . . ."

Mr. Justice Black, in his opinion in *Pennsylvania R. Co.* v. *Day*, 360 U. S. 548, 558-559, stated:

". . . For, under § 3 First (p) of the Act, if a carrier does not voluntarily comply with the Board's award, including wage awards for money damages, a wage earner can enforce the Board's order *only* by bringing, in a United States District Court, a suit which 'shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated. . . .'" (Emphasis added).

Mr. Justice Douglas, in his opinion in *Union Pacific R. Co.* v. *Price*, *supra*, said (p. 619):

"Tolerance of judicial review has been more and more the rule as against the claim of admin-

istrative finality. See *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 183; *Stark* v. *Wickard*, 321 U. S. 288, 309-310; *Harmon* v. *Brucker*, 355 U. S. 579, 581-582; *Leedom* v. *Kyne*, 358 U. S. 184, 190. The weight of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009, is on the side of judicial review, the finality of administrative action being sanctioned only where it is clear from the statutory scheme that judicial review is precluded."

While it is true that the above quotations from Justices Black and Douglas are from dissenting opinions, it is likewise true that that they are not in any manner in conflict with the majority holdings on the interpretation of Section 3 First (p) of the Act.

In Re Chicago Great Western R. Co., 17 F. Supp. 932 (N.D. Ill.), is in point here. It is interesting to note that the money awards there involved were not paid when awarded by the Adjustment Board, and the trustee in bankruptcy of the railroad sought instructions concerning the payment of such awards, and when it would be safe for him to make such payments. The Court instructed him to refrain from paying the awards made by the Board unless and until they were established and adjudicated as valid by the final judgment of a Court of competent jurisdiction. Certainly, it would not have been correct for the Court to have subjected the bankrupt railroad to a strike which would surely have worsened its condition.

Without exception, every Court that has spoken with reference to a strike to enforce an Adjustment Board award has said that such a strike is illegal.

In the case of *Grand Trunk Western R. R. Co.* v. *Railroad Trainmen,* 32 CCH Labor Cases ¶ 70,695 (N.D. Ill.), the Court said:

> "The controversy between the plaintiff and defendants arises out of four disputes involving the interpretation or application of existing collective bargaining agreements, or the interpretation of an award of a Systems Board of Adjustment."
>
> . . . . . .
>
> "The threatened strike if carried into effect would be illegal and constitute a violation of the Railway Labor Act (45 U.S.C. Section 151, *et seq.*)."

The Court, in *Baltimore & Ohio R. Co.* v. *United Railroad Wkrs., Etc.,* 176 F. Supp. 53, 58 (S.D. N.Y.), stated:

> . . . In the case of a minor dispute a strike during the pendency of the matter before the Adjustment Board is illegal and may be enjoined. There is no right to strike or to use any economic self-help or pressure even after the award has been made and the parties are bound to comply with it. . . ."

The Court of Appeals for the Seventh Circuit had the same opinion. In the case of *Chicago River & I. R. Co.* v. *Brotherhood of R. Trainmen,* 229 F. 2d 926, 931, it was stated:

> ". . . Except in instances where judicial review and enforcement of awards are expressly

provided for or contemplated by the act, § 3, First (p); cf. § 3, First(m), the Board's decisions are final and binding. We hold this to mean that a strike in regard to such minor disputes, or the Board's decisions thereon, would be illegal."

In the unreported case of *Atlantic Coast Line Railroad Company, Etc., Et Al.* v. *System Federation No. 44, Etc., Et Al.,* U. S. District Court for the Eastern District of Tennessee, Northeastern Division, Civil Action, File No. 1430, Feb. 27, 1960 (R. 289b-292b) the Court, after a hearing, granted a preliminary injunction enjoining a strike to enforce an Adjustment Board award. That case was appealed to the Sixth Circuit Court of Appeals, being No. 14,191. By a stipulation (R. 293b-295b) filed in the appealed case, it was shown that the strike threat was withdrawn, that an enforcement suit had been filed and a dismissal of the appeal was, by agreement, sought. Pursuant to stipulation, the appeal was dismissed (R. 296b).

In the case of *Denver and Rio Grande W. R. Co.* v. *Brotherhood of R. Trainmen,* 185 F. Supp. 369, 372 (D. Colo.), the Court enjoined a strike to enforce an Adjustment Board award and said:

"To hold that the procedures for decision are exclusive and that the procedure for enforcement is not exclusive would be inconsistent with the purposes of the Act. The injury to the public is the same whether the interruption of interstate commerce is for the purpose of obtaining a decision or for the purpose of enforcing a decision. To permit the interruption of service for the pur-

pose of enforcing a decision of the Adjustment Board, when the Act itself provides a remedy for such enforcement would defeat the essential purposes of the Act."

The latter case was affirmed by the Court of Appeals for the Tenth Circuit. *Brotherhood of R. Trainmen* v. *Denver and Rio Grande W. R. Co.*, 290 F. 2d 266, cert. den. 366 U. S. 966, reh. den. 368 U. S. 873. In its opinion the Court held:

"We agree with the trial court that the strike call was illegal because in disputes of the nature here involved the statutory remedy is exclusive, and the Board's money award may be enforced only by an action in the United States District Court as provided for in Section 3, First(p) of the Act. 45 U.S.C.A. § 153, First(p)."

In the very recent case of *Pan American World Airways* v. *Flight Engineers*, —— F. 2d ——, 45 CCH Labor Cases, ¶ 17,767 (C.A. 2), decided July 25, 1962, the Court stated:

"The Railway Labor Act was designed to provide comprehensive treatment for disputes arising in the industries which are subject to the Act. With the provisions for the settlement of 'minor' disputes, i. e. those arising out of the interpretation and application of existing collective agreements, we need here have no concern. Suffice it to say that the Act provides for such disputes a system of compulsory adjustment without resort to strike, and that strikes over 'minor' disputes are enjoinable without regard to the limitations of the Norris-LaGuardia Act. . . ."

Thus, it will be seen that the opinions of many Courts lead to the conclusion that the enforcement proceeding provided for by the Act is an exclusive remedy. Additionally, on the actual point here involved, five U. S. District Courts and four U. S. Courts of Appeals, including the courts whose opinions are now being reviewed, all agreed that such a strike was illegal and should be enjoined. *Not one Court has held otherwise.*

VIII. CONCLUSION.

It is respectfully submitted that the judgments of the Lower Courts are correct in all respects and should be affirmed by this Court.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

Section 2 of the Railway Labor Act provides (45 U.S.C. § 151a):

> "General Purposes
>
> "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

Section 2 First of the Railway Labor Act provides (45 U.S.C. § 152 First):

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 3 First (i) of the Railway Labor Act provides (45 U.S.C. § 153 First (i)):

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Section 3 First (m) of the Railway Labor Act provides (45 U.S.C. § 153 First (m)):

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute."

Section 3 First (o) of the Railway Labor Act provides (45 U.S.C. § 153 First (o)):

"In case of an award by any division of the Adjustment Board in favor of petitioner, the division of

the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named."

Section 3 First (p) of the Railway Labor Act provides (45 U.S.C. § 153 First (p)):

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or

otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Section 7 First of the Railway Labor Act provides (45 U.S.C. § 157 First):

"First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise."

CERTIFICATE OF SERVICE.

I, H. G. Breetz, one of the attorneys for respondent, Louisville and Nashville Railroad Company, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 24th day of September, 1962, I served copies of the foregoing brief on the petitioners, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to the following attorneys of record:

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